

15 J.C.

THE
Francis Hargrave.
DISSERTATION

OF
JOHN SELDEN, *K*

ANNEXED TO

F L E T A

TRANSLATED, WITH NOTES:

WAI

By the EDITOR of BRITTON:

TRANSLATED and ILLUSTRATED.

L O N D O N:

Sold by J. WORRALL, and B. TOVEY, at the Dove,
in Bell-yard, near Lincoln's-inn,

MDCCLXXI.

THE
PREFACE



TO THE RIGHT HONOURABLE
CHARLES LORD CAMDEN,
BARON OF CAMDEN PLACE
IN THE COUNTY OF KENT;
THE STEADY SUPPORTER
OF ENGLISH LIBERTY;
UPON PRINCIPLES OF LAW:
THIS TRANSLATION OF SELDEN,
WHO HIMSELF WAS SO EMINENT
AN ADVOCATE FOR THE
DUE MAINTENANCE OF THE LAWS
AND LIBERTIES OF THIS KINGDOM,
IN THE AGE HE LIVED;
IS MOST HUMBLY
DEDICATED BY
YOUR LORDSHIP'S
MOST DUTIFUL,
AND MOST OBLIGED
SERVANT,

ROBERT KELHAM.

TO THE RIGHT HONOURABLE

CHIEF JUSTICE OF THE SUPREME COURT

OF THE PROVINCE OF ONTARIO

IN THE COUNTY OF DUNDAS

IN THE MATTER OF

THE ESTATE OF

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P R E F A C E.

HAVING long regretted that so judicious a Treatise as this of the Great * *Selden's*, should lie, in a Manner, unnoticed, by being tacked to an Author, now so little read as *Fleta*; I have, in Hopes of bringing this little Piece more into Public View, attempted to Translate it.

The Subject, as will appear from the Contents of the Chapters prefixed to the Translation, is both very interesting and entertaining; and although this Dissertation is annexed to *Fleta*, there is only Part of the first, and last Chapters of it, which relates to that Author; and the same, in

* *Gratius* styled him, "The Honour of the *English* Nation."

all

P R E F A C E.

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all other Respects, might with equal propriety have been annexed to *Glanvil*, *Bracton*, *Britton*, or the *Mirror*.

I have added some Notes ; and should this Translation be favourably received, the utmost of my Wishes will be answered.

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THE DISSERTATION

OF

John Selden Esq; annexed to
Fleta.

CHAPTER I.

SECT. I.

Of the Edition.

THE antient Commentary on the Laws of *England*, called *Fleta*, so long, and so often wished for, by the learned, now at last appears in print. Some Bookfellers, by the Help of a Librarian, whom they hired, plainly neither sufficiently skilful, or diligent, procured an Edition, such as it is, from an antient Manuscript, then a valuable Part of the *Cottonian* Treasure: This Manuscript has been a long Time my Property, and still continues so; and, as far as I know, is the only one (*a*) extant, and not of a

(*a*) There is a Manuscript of *Fleta* in the Library belonging to the Society of *Lincoln's-Inn*,

much later Date than the Time of the Author, and some (b) Copies have heretofore been taken from it. I was not at all concerned in the Edition, for if I had, I should not have permitted so many Words of the antient Manuscript curtailed after the Manner of Law Writings, and (as *Manilius* said of the Writings of the old *Formulists*) *notis levibus pendentia verba*, Words hanging as it were on slight Marks, to have been so punctually retained; nor would I, unless it had been in a Dress and Disposition more commodious to the Reader, have suffered it to be printed, or have let pass the trifling little Notes and insignificant Signs in the Margin, not to mention the vast Number of other Faults this Edition abounds with; much less would I so inadvertently have permitted the small *French* Tract, called, as is usual among the Lawyers, from its initial Words, *Fet* * *assavoir*, and frequent in our old Manuscript Collections of the Law, to be, as if it had been a Part of it, tacked to the End of the Treatise. It is however true, that the said little Tract, was annexed to the antient Copy, from whence this Edition is made, and in a Character indeed, not altogether unlike: But between it and *Fleta*, there is no other Kind of Relation. It was no sooner printed, than its Editors earnestly requested me to prefix a Title to it; and

* Vid. *Fleta* p. 644.

(b) *Sir Symonds D'Ewes* had one.

to say somewhat concerning the Book, its Author, and its Name, which I without Difficulty comply'd with, being then, by reason of a few Days slight Indisposition, quite at Leisure, and retired, though at the same Time unfit for, and incapable of Studies of a more extensive Scrutiny, and of an Application to more weighty Affairs.

S E C T. II.

In what Class of Writers, the Author of *Fleta* is to be ranked.

TH'E Author of this Book is hitherto altogether unknown, but is, whosoever he was, to be reckoned among the following antient Writers, *Ranulph de Glandvill*, (at least if he wrote the Book going under his Name, which has Reference to the reign of King *Henry* the Second) a most excellent Personage, in the highest Degree of Favour with the aforesaid King, and at the Helm of public Affairs; *Henry de Bracon*, who was, in the latter Years of the Reign of King *Henry* the Third, a considerable Judge; the anonymous Author of the Royal Compendium of the same *Bracon*, with some of the subsequent Laws of *Edward* the First inserted, called *Breton*, or *Britton*, concerning whom, more by and by; *Ralph de Hengham*, *Gilbert de Thornton*, who, as well as the other, and this our Anonymous, (of which Matter more

hereafter) wrote under *Edward* the first: *Andrew Horn*, in the Time of *Edward* the second, and some others of the same Kind, either preserved in the Archives of the Exchequer, or remaining neglected in the Libraries of the Curious. The Author of *Fleta*, is in my Opinion, chiefly to be ranked in the Class of the aforesaid Writers, his Work (as well as the Writings of the others, exhibiting, tho' with some Difference, according to the diversity of their respective Ages and judgments) a View of the Law of *England*, such as it antiently was under *Edward* the First. This Author, as well as the others are of great Service to our Countrymen, who in earnest apply themselves to the Study of the Law, and are desirous of knowing its Origin and Progress to the very Bottom, which task has, with Relation to the Imperial Law, been already performed by *Papirius, Tubero, Julian, Proculus, Flavius, Ælius, Cato, Sabinus, Brutus, Alphenus, Labeo, Papinian, Neratius, Jabolenus, Celsus, Pomponius, Scævola, Caius, Paulus, Ulpian, Callistratus, Modestinus*, and by many such others, whose || Writings would, had they been preserved entire, be in the highest Degree valuable. *Fleta* has indeed many Things, so very like what's contained in *Bracton*, and *Thornton*, that he frequently makes Use of their very Words; yet He at the same Time, especially in his Second Book, delivers many other Matters, which

¶ Videfis l. 2.
D. tit. de Origine
Juris.

ft: which are neither to be found in them, or
Ed- in any other Author we have perused.

S E C T. III.

Of the Use and Authority of such Writers.

TH E S E Kind of Authors are gene-
rally ranked by us in the Number
of those, whose Learning is considered
merely as ornamental to Discourse, both in
the Forensic, and Scholastic Disputations of
our Law, and as carrying no Authority
themselves, and this is countenanced by
very considerable * Authors, tho' in my
Opinion, with all due deference to such great
Men, their Judgement, as to this point had
it's rise and progress from a very great Error,
which they, thro' inadvertency, fell into ;
For altho', on Account of the Antiquity of
such Writers, and the very many interven-
ing subsequent Alterations of the Law, they
at Present are not in many Things of such
Weight, as to be of themselves of sufficient
Authority, with regard to Decisions, Judg-
ments, and Consultations ; they however
contain numberless Things, which to this
Day, either remain entire, or at least are
not wholly abrogated ; as particularly, in
Matters, Feudal, Criminal, and Hereditary,
in Contracts, Translation of Property, and
in some other Cases, which daily occur : Or
we are, by them more fully informed of the

* 35 Hen. 6.
Fitzherb. tit.
Gard. 71. Plow-
den. Com. part.
1. f. 157. Atque
inde alii.

an-

antient Customs, and Laws of our Ancestors preceding those Alterations: wherefore it certainly must be granted, that they plainly carry with them an Authority, on which the Interpretation of the Law may depend, as well as be allowed to be Ornamental in forensic, and scholastic Disputations. Can it be doubted, if we had not been to that Degree as we are, through the Injury of Time, deprived of the Law Writings of the antient *Romans* before mentioned, but that we should thence have drawn great Light and Authority, towards a right Understanding and Explanation of the *Pandects* (now filled only with some of their Fragments, which *Tribonian*, in modelling and settling the Law, adapted to his own Sense) as well as of the Codes, and Novells of the Emperor *Justinian*: Certainly we are too often, by that immense Loss, unhappily deprived of many great Helps, towards a thorough insight into the Roman Laws; as the no Way contemptible Specimens of the small remains which have been preserved of *Caius*, *Ulpian*, *Paulus*, and some other such like concerning this Matter, sufficiently shew us. Such antient Authors moreover, are, with regard to the more modern ones, and such as are of greatest Authority in the Study, and at the Bar, to be considered much in the same Light, as Sanctions, and Laws formerly made, are, with respect to those, by which the same have either been abrogated, altered, or renewed: even an abrogated Law,

Law itself, much more one altered or renewed, and the reason of abrogating, altering, and renewing it, being diligently weighed (for a Lawyer, without such a previous comprehensive survey, cannot form a thorough Judgement) plainly affords a very extensive
 † Authority to the Law last made, and contributes towards the right understanding the Matter then in debate. Thus, in the Imperial Law, the *Theodosian Code*, and what is published with it, is, in many Things, of great Assistance to the *Justinian Code*. Those four antient Compilations also of the Decretals by *Antonius Augustinus*, as well as the 5th, or *Honorian Decretal*, very lately published by *Innocentius Cironius*, are of Service to the *Gregorian Part* of the Body of the Pontifical Law. So both *Burcardus*, and *Ivo*, as well as others of the same Class, are of singular Use, particularly towards understanding the Compilation made by *Gratian*, and doubtless the *Justinian Pandects* themselves, as well as the other Codes, whence the *Leonine Basilic* was composed, which, whilst we are writing this, we for the first time enjoy from the Edition of that eminent Person, *Carolus Annibal Fabrotus*, likewise afforded extraordinary Help to those of the East, during the time they made Use of the aforesaid *Basilic*. The same may in like Manner be plainly said of numberless antient Laws of our own, and other Countrys, which have been either wholly annulled, altered, or renewed.

† D. tit. de legibus 26. 27 28, et ibi Glos. et DD. Constantinus Rogerius de Juris Interpret. cap. 11. Alderanus Mascardus Conclus. de Statutorum inter p. 2. &c.

Neither indeed can it be thought, that any one Writer at all of the Law should be found, whose single Authority, as to times subsequent to his own, must not decrease according to the various Reason and Use of the Customs and introduced Laws ; but it is at the same time so far only diminished, as it clashes with the Customs and Laws thus superinduced ; In which nevertheless, that Authority remains so firm, that the antient Law, is thence chiefly to be learned, it's Use being, as it were, borrowed to interpret subsequent Laws, and is for that Reason altogether necessary and excellent ; In short, both the Use and Authority of such antient Writers, is not unlike that of Epochs, from, or by which, the Deductions and Computations of Time, or of Motion, are made.

C H A P.

CHAPTER II.

SECT. I.

Of the Manuscript Sum, wherein
Gilbert de Thornton, chief Justice
 under *Edward* the First, abridg-
 ed *Bracton*.

AS the Author of *Fleta* transcribes
 many Sentences and entire Pe-
 riods, as well as the Matter itself, from
Bracton and *Thornton*, just so *Thornton*,
 as *Bracton's* Epitomizor, copies him; and
 this Author being much such a Kind
 of Writer as *Fleta*, and in a great Measure,
 unknown, and unheard of, it may not be
 here improper, to add somewhat concern-
 ing him. This same *Gilbert de Thornton*,
 as every one, acquainted either with our
 Archives, or the Year Books of our Law,
 knows, was invested in the reign of King
Edward the first with the supreme judi-
 catorial Power, or with that of Chief Jus-
 tice. (a) Now *Thornton*, in the twentieth Year
 of the aforesaid King, with the utmost Di-
 ligence reduced *Bracton* into a Compen-
 dium, from whence we may form a Judg-
 ment, how great the Authority of *Bracton*,
 who was somewhat more antient than *Fleta*,
 was, in discussing Points of Law in the
 Time of *Edward* the first, whose juridical
 Annals

(a) C. J. of the King's Bench, 18 Ed. 1.

* Ut ex Temp.
Ed. 1. cas. Cob-
ledike 7. c. f.
Calvin, Cok. re-
lat. part. 7. Et-
sæpissime in Fitz-
herberti Breviario
liquet.

Annals have hitherto, and still continue to be considered in our Courts, as having Authority* and Weight in Matters of greatest Moment. I have by me a Manuscript of that Compendium, which from the Character it is wrote in, clearly appears to have been penned, during the Author's Life. I met with it in the Library, formerly the *Burleian*, and never heard of, or saw any other Copy. This Manuscript is distributed into eight Parts, though it is very imperfect. The Title of it is, *Summa de Legibus et Consuetudinibus Angliæ, a Magistro Henrico de Bryctona composita, tempore Regis Henrici filii Regis Johannis* — The Sum of the Laws and Customs of *England*, composed in the Reign of King *Henry*, Son of King *John*, by Master *Henry de Brycton*. There is afterwards added, Abridged by *Thornton*.

SECT. II.

Of the various Names given to *Bracton*.

IT is not to be wondered at, that the Person, commonly by us, as appears by his printed Works, called *Bracton*, should, his Name being often very variously wrote, be in the above Place stiled *Henry de Brycton*. And though we in the Beginning of his printed Works read, *Ad Instructionem saltem minorum ego Henricus de Bracton anim-*
mum

num erexi, &c. — I Henry de Bracton have bent my Mind towards the Instruction of young Students, &c. — Some other Manuscripts have only, *Ad, &c. Ego talis, &c.* — Towards, &c. I such a one, &c. — Others, *Ego talis H. animum, erexi, &c.* — I such a one H. have applyed myself, &c. And I have by me, among other Manuscripts, a very beautiful one of this Author, more antient than the Beginning of the Reign of Edward the first; yet somewhat of a later Date than the Author's Time, in which, after a Recital of the Lemmas of the Chapters, these Words follow — *Expliciunt Capita Britonis* — Here end the Chapters of Briton. So that he was called Bracton, and Brycton, and Britton, and Briton also: And as is presently shewn, he is elsewhere named Breton too: Whence I am of Opinion, that the Compendium, called Britton, enlarged with some subsequent Laws, commonly, through a manifest Error, attributed to John Bretoun, Bishop of Hereford, dead many Years before the writing of it, was at first called after its Author, who wrote it in the Name, and by Command of King Edward the first. It can't be deny'd indeed from the Place in Bracton's printed Works, where * he treats of Error of the name in the King's Writs, but that his real Sir-name appears to have been *de Bracton*. Yet it is at the same Time, past all Doubt, that he was antiently, not only called by the rest of the Names we have mentioned,

but

* Brac. l. 4. de
Ass. novæ Disseis.
c. 20. f. 4. fo.
b. 188.

but likewise by some others. And Manuscripts, in the Place relating to Error about Names, in which he brings his own as an Example, differ. One of my Manuscripts, penned in the Age immediately subsequent to the Author's Time, has, instead of what we find in his printed Works—*Item si erratum sit in syllaba, ut si quis alium nominet Henricum de *Brathon si nominare deberet eum de Brachiton. Item idem erit in litera, ut si quis erraverit sic nominando Henricum de Brochton, et nominare deberet eum Henricum de Braketon.* Also if the Error be in a Syllable, as if any one should call another *Henry de Brathon*, where he ought to have called him *de Brachiton*. The same with Regard to a Letter, as if any one should thus err, naming one *Henry de Brochton*, where he ought to have said *Henry de Braketon*, and other Manuscripts in that Place greatly differ. It is moreover evident from the written Instrument of *Richard de Schardeburgh*, made to *Thomas Bec*, Arch-deacon of *Dorchester*, concerning a Book which the said *Richard*, about the beginning of the Reign of *Edward* the first, had through the Hands of this *Thomas*, borrowed of *Robert* Bishop of Bath, that it was at that Time usual to call him expressly by the Name of *Henry de Breton*, and his Book, *Brettone* and *Breton*. The Title in the Archives *

* Vid. Bract. p. 188. b.

* In Codice MS, Bullarum &c. apud Camerarios Scaccarii, fo. 175.

is,

Litera

Litera R. de Scardeburgh per quam recepit ex mutuo de Magistro Thoma Bec quendam librum, qui vocatur Brettone.

The Letter of R. de Scardeburgh, by which it appears, that he borrowed of Master Thomas Bec, a certain Book, called, Brettone. The Instrument itself is as follows,

Universis presentes literas inspecturis R. de Scardeburgh Archidiaconus salutem in Domino sempiternam. Noveritis me recepisse et habuisse ex causa commodati librum quem Dominus Henricus de Breton composuit, a venerabili patre domino R. dei gratia Bathoniensi Episcopo per manum magistri Thomæ Bec Archidiaconi Dorsetiæ, quem eidem restituere teneor in festo Sancti Johannis Baptistæ, Anno Dom. MCCLXXVIII. In cujus rei Testimonium presentibus sigillum meum appensum, Datæ Doveriæ die Veneris post Purificationem Virginis gloriosæ, Anno MCCLXXVII.

Richard de Scardeburgh, Archdeacon, wisheth to all who shall read these Presents eternal Salvation in the Lord. KNOW YE, that I have borrowed and received a Book composed by Master Henry de Breton, from the venerable Father Lord R. by the Grace of God Bishop of Bath, by the Hands of Master Thomas Bec Archdeacon of Dorsett, to whom I oblige myself to restore the same on the Feast of St. John Baptist, in the Year of our Lord 1278. In Witness whereof my Seal is affixed to these Presents, dated at Dover the Friday after the Purification

cation of the glorious Virgin in the Year 1277.

This Instrument was made in the sixth Year of the Reign of *Edward* the first, and each of these Persons must have known *Bracton* himself when alive. But with regard to his Name there are besides express Testimonies in the Archives themselves, which * record that *Bracton* was a Judge. He is therein frequently called *Henry de Bretton*, and sometimes also *de Bratton*.

* Vid. Rot Claus.
43. Hen. 3. dorf,
7.—et dorf. pat.
43. H. 3. et quæ
in id Genus tabu-
lis antecedunt.

S E C T. III.

Of the *French* Compendium of the Law, called *Britton*.

IT is the received Opinion indeed, that *John Bretoun*, or *Bretun* (by some * falsely called *Becton*) Bishop of *Hereford*, coeval with our *Henry*, and learned in the Laws of *England*, was the Author of the Compendium which we call *Britton*. He is, in the *London* Edition likewise of *Matthew* a Monk of *Westminster*,^(a) or *Florilegus*, printed in the Year 1670, and in the subsequent Edition of the same Author in *Germany*, expressly allowed to be the Author of the said Compendium. The Words in that Edition

* Balæus, Pit-
sæus &c.

1570.

(a) He ended his History at the Year 1307, and was stiled *Florilegus* from his being a choice Collector of the Flowers of former Historians.

Edition are, *Obiit hoc anno Johannes Bretoun episcopus Herefordensis qui admodum peritus in iuribus anglicanis librum de eis conscripsit, qui vocatur le Bretoun.* This Year (1275, or the third of *Edward* the first) died *John Bretoun* Bishop of *Hereford*, who being very skilful in the Laws of *England*, wrote a Book of them, called *Le Bretoun*. And by this Name, without doubt, is meant either the *Latin* Work of *Braeton*, or that smaller *French* one, both of them, as is plain, being antiently called by the same Name. But it is evident, that whether the one, or other be intended, this must have been a Mistake of the Writer, whosoever he was, who rashly foisted it into the Works of *Florilegus*, because that Monk, as shall be presently shewn, was not the Author of it. No one, I am of Opinion, will admit this to have been said of the *Latin* Work of *Braeton*. And should it be affirmed that the *French* Work is there meant, neither can this be granted, since a Person, who died in the third Year of *Edward* the first (for this Bishop* of *Hereford*, at that Time, departed this Life) could not insert in his Writings Acts of Parliament † made more than ten Years after his decease.(a) And indeed I have a very antient Copy of that *French* Tract or Compendium, at the Close
of

* Vid. Notas.
ad Rad. de Heng.
ham. p. 129.
† Vid. Britton.
c. 14. c. 36. &c
ubi Statuta 13.
Ed. 1. seu West.
2. habentur.

(a) See this accounted for by *Mr. Wingate* at the End of his Collection of Historical Passages, concerning the Author of the Book, called *Britton*.

of which is added—*Ici finist le Breton que contient IIII lieures en les queux chescun maniere de plee est contenue*—Here ends *le Breton*, containing four Books (that Treatise being so divided) in which every kind of Plea may be found—And I remember to have formerly somewhere read a Dystich in Rhyme, at the End of some such Copy, but don't thoroughly recollect all the Words of it; the first Verse however ended with *Brato*, for the Author's Name, and — *et dixit talia nato*, finished the second; which Circumstances also further plainly prove, that the Name of *Henry de Bracton*, or *Breton*, in the Book, commonly called *Britton* and *Breton*, is to be understood, as of that of the primary Author of the Work, tho' enlarged with some Matters of a later Date than his Time. The same Book, called *Britton*, is likewise in our Law Annals,* evidently named *Bracton*. Thus we still properly say, the *Justinian Code*, notwithstanding his own Novells, as well as some Constitutions of the Emperor *Frederick*, were, many Ages after his Reign, added to it. In the same Manner we frequently call *Xiphilinus Dio*, *Justin Trogus Pompeius*, *Florus Livy*, that is, we point out the Epitomizers themselves by the Names of their Authors. And as to that Place in the Edition we have mentioned of *Florilegus*, tis not at all to be found, either in the first Edition printed in the Year 1567, or in the antient Copies of the same Manu-

* Conferas 35.
Hen. 6. fo. cum.
33. Hen. 6. tit.
Gard. 71.

Manuscripts preserved in the Libraries of *Lambeth* and *Westminster*. Wherefore we make no doubt, but that it was by some Sciolist or other inconsiderately inserted in it.

S E C T. IV.

The Title of the *Thorntonean Sum* and the *Lemmas* of its Parts, many of which are imperfect.

IT is evident, that the Work of *Thornton* we have been speaking of, is an Abridgment of *Henry de Bracton*, for we chuse to retain that Name, though *Thornton* calls him *Brycton*. The whole Title follows,

Incipit Summa de legibus et Consuetudinibus Angliæ a Magistro Henrico de Bryctona composita tempore Henrici filii Regis Johannis, quam quidem Summam Dominus Gilbertus de Thornton, tunc Capitalis Justitarius Domini Regis in Anglia secundum statuta et leges tunc usitatas, ad utilitatem posterorum diligenti studio postmodum abbreviavit sub compendio, anno regni Regis Edwardi filii regis Henrici vicesimo. Et ipse idem Dominus Gilbertus tempore illo Scientia, bonitate, et mansuetudine floruit eleganter.

C

Here

Here begins the Sum of the Laws and Customs of *England*, composed in the Reign of *Henry* Son of King *John*, by Master *Henry de Brycton*, which Sum indeed, Master *Henry de Thornton*, then Chief Justice of our Lord the King in *England*, afterwards in the twentieth Year of the Reign of King *Edward*, Son of King *Henry*, with great Application made an Abridgment of, according to the Statutes and Laws then in Force, for the Use of Posterity. And this Master *Gilbert*, was at that Time eminently conspicuous for his Knowledge, Goodness, and Mildness.

The Sense is, that *Thornton*, while Lord Chief Justice, to wit under *Edward* the first, made this Compendium and Breviary, and that he did this according to the Statutes and Laws then in Force; that is, he gives us *Bracton's* Works, so far as they may be of Help to Posterity towards rightly understanding the Laws and Statutes at that Time in Force, for he makes no mention of the intermediate Statutes themselves, made between the Time of *Bracton*, and that of his own Writing, as for Example of Demand of Dower, *of Homicide by † Misfortune, of conditional Gifts, § and some others such like: He, as is usual with Epitomizers, passes by a great many Things, neither does he always follow *Bracton's* Method, but sometimes another, and makes a different Distribution, as may more plainly be perceived from the eight Parts of this Work, disposed in the fol-

* 3 Ed. 1. Wef.

1. c. 49.

† 6 Ed. 1. Glouc.

c. 9.

§ 13 Ed. 1. W.

2. c. 1.

following Manner. We read after the Title — *Et notandum est quod præsens Opus in octo partes dividitur.*

And it must be observed, that the present Work is divided into eight Parts.

Prima pars tractat de personis et earundem variis conditionibus, de rebus et rerum divisionibus, de Donationibus et Confirmationibus.

Secunda, de actionibus et obligationibus, de pœnis et judicum potestatibus, de Itinere Justitiariorum et eorum capitulis.

Tertia, de criminibus et Homicidio, et de appellis et Feloniis.

Quarta, de Vetitis Namiis et Disseisinis.

Quinta, de communia pasturæ, et ejusdem ammensuratione, de assisa mortis antecessoris, de Damnis et convictionibus.

Sexta, de brevi de Recto, de Summonitionibus et Effoniis.

Septima, de Exceptionibus et regiis prohibitionibus, de Bastardia et gradibus successionis.

Octava, de homagiis et Releviis, hæreditatibus et Donationibus propter nuptias, et Dotibus mulieribus assignandis.

The first Part treats of Persons, and their various Conditions, of Things, and the Divisions of Things, of Gifts and Confirmations.

The second of Actions, and Obligations, of Punishments, and the Power of Judges, of the Eyer of the Justices, and their Articles.

Here begins the Sum of the Laws and Customs of *England*, composed in the Reign of *Henry* Son of King *John*, by Master *Henry de Brycton*, which Sum indeed, Master *Henry de Thornton*, then Chief Justice of our Lord the King in *England*, afterwards in the twentieth Year of the Reign of King *Edward*, Son of King *Henry*, with great Application made an Abridgment of, according to the Statutes and Laws then in Force, for the Use of Posterity. And this Master *Gilbert*, was at that Time eminently conspicuous for his Knowledge, Goodness, and Mildness.

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The first Part treats of Persons, and their various Conditions, of Things, and the Divisions of Things, of Gifts and Confirmations.

The second of Actions, and Obligations, of Punishments, and the Power of Judges, of the Eye of the Justices, and their Articles.

The third, of Crimes, and Homicide, and of Appeals, and Felonies.

The fourth, of Distresses refused to be delivered, and of Disseifins.

The fifth, of Common of Pasture, and Admeasurement thereof, of Affize of Mortdancestor, of Damages, and Attaints.

The sixth, of a Writ of Right, of Summonfes, and Effoins.

The seventh, of Exceptions, and the King's Prohibitions, of Bastardy, and Degrees of Succellion.

The eighth, of Homages and Reliefs, Inheritances and Gifts on Account of Marriage, and Dowers to be affigned to Widows.

With Regard both to Method and Distribution, the Manuscripts of *Bracton's* Works greatly differ. There is a very beautiful and antient Copy of *Bracton* in the publick Library at *Oxford*, which, though it bears the Name of *Henry de Bracton*, is not at all distributed into Books, as the printed ones are, but is only so divided into Centuries, that after ten of them are distinguished by their respective Numbers, sixty-seven more short Chapters follow; so that the whole Work consists of one thousand and sixty - seven short Chapters. Other Manuscripts have a continued Series of Chapters to the End. The Manuscript of *Thornton* is moreover so imperfect, that whereas, each Lemma being added, the Chapters of the first Part make up fifty-eight, and those of the second nineteen, what should follow after

ter the forty-second Chapter of the first Part, and after the tenth of the second Part, somewhat of the ninth excepted, is entirely wanting. The same may be said of the third Part, consisting of thirty one Chapters, those between the eighth and the twentieth, not being contained in it. The fourth Part has twenty-six Chapters. The fifth had eighteen, of which, except a Part of the sixteenth, the two last only are extant. The sixth Part containing twenty-one Chapters is entire. The seventh had twenty-five Chapters, but fifteen of them only remain. The eighth Part is complete, and contains fourteen Chapters. He begins just as *Bracton* himself does, making Use of the very same Words as are found in the printed Editions of that Author, except that he does not introduce the Name of *Bracton*, though he at the same Time, like *Bracton*, speaks in the first Person, and in the same Manner as the Manuscript — *Ego talis animum induxi, &c.* — His concluding Words also; and the whole last Chapter of the eighth Part, are almost the very same Words with which *Bracton* ends his Work. We have just Reason to believe this Abridgment by *Thornton*, to have been penned by the King's Command, or at least under his Favour; for we read in the Annals * of our Law, that this *Edward* (therein by *Mil-* take off the Press, called the second) being desirous of having all the Laws and Customs of his Kingdom reduced into Writing, did,

* 35 Hen. 6. fo. 42 a.

for that Purpose, by the Assistance of the most eminent Lawyers in his Reign, compile, and that in his own Name, some other Books besides the celebrated one of *Britton*. What follows of *Priset*, Chief Justice in civil Causes, called Common Pleas, under King Henry the sixth, must plainly be understood of *Britton*.

At a Time when Debates arose in Court upon the Statute enacted in the third Year * of *Edward* the first, concerning the Age of being out of Ward. (He † says) *Cest estatut fuit fait en temps le Roy E. le 2, lequel roy fuit in purpose daver mise tout en certain, per que il fist un liver deux ans apres cest estatut jet et en que cest estatut est reberse.*

* West. 1. c. 22.
† 35 H. 6. Fitz.
Tit. Gard. 59.

This Statute was made in the Time of *Edward* the 2d (which plainly should be read, *E. le 1.* for *Edward* the first) which King having resolved to reduce all the Laws to a Certainty, he to this End, two Years after the enacting the said Statute, published a Book wherein this Statute is recited.

This very Statute is set forth in *Britton*, § and it is generally believed, that this very Book is there meant. At the same Time I am of Opinion, that it is past all Dispute that it ought, instead of *deux ans*, two Years, to be read, *douze ans* twelve Years, for the the Statutes || also of the thirteenth Year of the same King, or those we usually call *Westm.* the second, are expressly mentioned in that Author; whence it is evident, as we have already observed, that it was wrote, not two, but

§ West. 2. c. 1.
& c. 38 in Brit-
ton. c. 36. & c.
34.

but at least ten Years, after the third of *Edward* the first. Wherefore it must, if we rely on *Prisot*, have been penned about the fifteenth, and by no Means about the fifth Year, of *Edward* the first, as those, who are over confident in their mistaken Opinion grounded on the corrupt Reading of this Place, would have it. There is likewise in another Copy of the Law Annals, from whence that Quotation of *Prisot* is taken, expresse Mention also of other Books having been wrote by Command of the same King.

The Words are— † *lequel roy fuit ap purpose* † 35. Hen. 6.
daver mise tout en certain et en escripture et † 42.
commence de ceo faire liver de et par plus sages
homes del ley deins le realme s: Juges et autres.

Il fist un livere deux ans prochein apres le fessance ce del estatute, &c.—Which King (to

wit, *Edward* the 1st, as the most correct * • Anni. 1601.

Editions have it, for it is in others † corruptly read *Edward* the second) being re- † Anni. 1557.

solved to reduce the Laws to a Certainty, and into Writing, began to that Intent, with and by the Assistance of the greatest Sages of the Law within his Realm, as well Judges as others, to compile Books. He published a Book two Years (read twelve Years) next after making the said Statute. And there seems no Room to doubt but that *Thornton's* was of this Number. The Words *In Rege qui recte regit &c.* are in the Beginning of it, just as in *Bracton*, and the first Word is depicted in a very large and elegant Space, and variegated with Gold and

Colours, within which the said King in this Manner seated on his Throne in his Royal Robes, addresses himself to the six (a) Judges standing before him, ornamented in their Law Robes, from thence intimating to us that his royal Mandate very nearly related to that Book, and that he himself was as it were the Author of it, as much at least, as *Justinian* was of the *Tribonian* Collections, and that it was then to be understood from the Throne, that he had in the aforesaid Book instructed the Judges and the rest of the Lawyers, in the Laws and Customs of *England*. Neither is *Thorn-ton* a bare Epitomizer, but sometimes also an excellent Interpreter, and Expounder of *Braeton*, though he passes by the Cases and Determinations of Law, many of which are mentioned by this Author, as well as almost all the Quotations of the Places, cited out § of the Books of the Imperial Law by *Braeton*, and which are basely handled by his Editors, but he has not omitted them all. We shall add a few things both concerning this Matter, and of the use, such Writers, as well as the Author of *Fleta*, have made of the Civil Law; And how likewise the same Law was formerly admitted, laid aside, restored, moderated, and limited within narrow Bounds, in this Part of our Island; and this we make

§ *Brac.* l. 2. dē.
acquirend. re-
rum dom. c. 12.
l. 3. de Actioni-
bus c. 8. f. 3. et.
c. 9. f. 3.—et c.
12. f. 5. &c.

(a) Antiently there were twelve Judges, six of the court of K. B. and six of the Com. Pleas. *Plowd. Comment. Eng. Edit.* fo. 231.

no Doubt will be very acceptable to the learned.

CHAPTER III.

SECT. I.

The manifest Footsteps in *Thornton*, in the Author of *Fleta*, and in *Bracton*, of the Use antiently made by the *English* Lawyers, as such, of the Books of the Civil Law.

THE Law, says *Thornton*, * *gravem pœnam infligit Judici corrupto per munera sordida*—inflicts a great Penalty on a Judge corrupted by sordid Gifts — *ut C. ad legem milit*, (so the Manuscript has it ;) but it ought to be read, *C. ad legem Juliam*; which is concerning Bribery) *l. omnes, ubi dicitur quod omnes Cognitores et Judices a pecuniis manus abstineant ne alienum furgium putent suam prædam*—In which it is said, that all Officers and Judges are to refrain from Bribery, least they should look upon the Disputes of others as their Prey—and *Bracton* * has thus cited the same Law from

* Part. I. c. 11.

* Brac. lib. 3. de action. c. 8. f. 3. fo. 106. b.

from the *Justinian Code*, as is evident from the Manuscripts of his Works, notwithstanding that in the first Edition of the same author, printed in the last Century, as well as in the late Edition (both which pretend to have been published from Manuscripts with the utmost Care, (it is falsely read *ut C. ad legem vel repetet l. omnes*, instead of *ut C. ad legem Jul repetund l. omnes*, and instead of *à pecuniis-à re cuivis*, is ridiculously substituted ; as also a little after in the same Place, *ut C. s. l. ultima*, instead of *ut C. e. (for eodem titulo) l. ultima*, by which Delinquents are obliged to a four-fold Restitution mentioned there by *Theo. & Valentinian*. And in both these Editions, we meet with many Faults, and those even of the grossest Nature, partly proceeding from the Ignorance of the Librarians, partly from Carelessness. *Bracton* and *Thornton* in other Places apply the very Laws they have cited from the *Justinian* Body of the Civil Law, both of them having added, and as is usual with Civilians, referred to the Places of that Law, which are by the Author of *Fleta*, wholly omitted, tho' this last, as well as they, expressly recites the Laws themselves, and as being at that Time here in Force. For example, the Author of *Fleta* speaking of Gifts between Man and Wife, The Words, says he,* of the Law are these — *Si in nomine et substantia nihil distet a dote, &c.* He there adding what follows in that very Law which he

* *Fle. lib. 3. c. 3. f. 25. & 26. fo. 179.*

he hints at, made by *Justinian* † himself, as both *Thornton* § and *Bracton* || also do. But each of these Authors, have in their Manuscripts likewise added, the very Place of the Law, which is omitted in *Fleta* thus, *C. tit de Donationibus ante nuptias l. cum multæ*, instead of which, it is in the printed Works of *Bracton* corruptly read, *cum milite*; and instead of what is in the very Law (as is truly set forth by *Thornton* and the Author of *Fleta*) *Sancimus omnes licentiam habere, &c.* Upon which Words, as being spoken in the Person of *Justinian*, every one must see the whole Force of the Law depends, it is very falsely printed, *Scimus omnes licentiam habere, &c.* But such Faults as these are very frequent in *Bracton's* printed Works, and are also often found even in some of the antient Manuscripts of the same author. And thus it appears, that that *Justinian* Sanction was understood by this Triumvirate, viz. *Bracton*, *Thornton* and *Fleta*, under the Name of a Law, and a Constitution, and an Inhibition: as if the Right of Donation between Man and Wife, had in *England* likewise thence derived its Force. And if in Donations between Man and Wife, any thing passes otherwise than that *Justinian* Law prescribes, *Bracton* * and *Thornton* affirm it to be an Abuse of the Constitution, and the Author of *Fleta* asserts it to be an Abuse of the Inhibition. It is likewise elsewhere read in *Fleta*, † *Donationes etiam post feloniam perpetrata factæ per-*

† L. 20. C. tit. 3 de Donat. ante Nuptias lib. 5. § Thorn. Pars 1. c. 33. || Bract. l. 2. de acquir. rer. domin. c. 12. f. 29. 6.

* Bract. l. 2. c. 5. f. 5. fo. 12. b.

† Fle. 1. 3. c. 10. f. 2. & 3. fo. 189.

perfectæ erunt et perpetuæ, nisi donatores hujusmodi de felonis suis in vita sua convincantur—Donations also made after Commission of Felony shall be firm and lasting, unless the Donors are in their Life-time convicted of Felony, which is plainly agreeable to the Law now in force among us, as well as to the antient Law, but *Fleta* immediately adds—*et ad hoc facit lex Imperatoria*,—and this is confirmed by the imperial Law—*Post capitale crimen contractum donationes factæ valent, nisi condemnatio fuerit subsequuta*, which is l. 15. *D. tit. de Donationibus*, taken from *Marcian's* Institutions.

* Brac. l. 2. de. acqui rer. D m. c. 5. f. 5. fo. 12. b. et Cap. 13. ad finem fo. 30. b.

And the same is also cited by *Bracton** thus, *Et ad hoc facit Lex F. (instead of ff) de Donationibus, post contractum, &c.* And in another Place, *Convenit Lex cum consuetudine Anglicana ff de donation. l. post contractum, ubi dicitur quod post Contractum capitale crimen Donationes factæ valent nisi Condemnatio subsequuta sit.* And *Bracton* with

* C. videfis c. tit. de Donat. inter Vir. et Ux. l. 24. res Uxoris et l. 31. D. dict. tit. in fine.

good Grounds in the former Place, says,* *Innuat ergo*—the Law therefore hints, *quod nisi fuerit subsequuta, valent Donationes, et si fuerit, quod non valent.*—That unless there be a subsequent Conviction, the Donations are valid; but if there be, they are not—and thus both read that Law, as it is found in the more vulgar and common Editions of the *Pandects*, leaving out the express negative Word, met with in the more accurate Editions; for in the *Florentine* Editions, it runs thus—*post Contractum capitale Crimen Donationes factæ non valent*

ex Constitutione Divorum Severi et Antonini, nisi Condemnatio secuta sit—Donations made by any one after his having been guilty of a capital Crime are by the Constitution of the Emperor's *Severus* and *Antoninus*, invalid, unless Conviction of the Donor follows—which extraordinary Form of Expression may seem to one, not thoroughly weighing it, to import that the Donations of the convicted were good, which had they not been convicted, would have been null, for this seems to be its literal Meaning : some therefore will have *si* substituted in the Place of *nisi* ; for then the Donation is made void by the Conviction only. The Doctors also are very much divided in their Opinions concerning this Law, and *Bartholus* speaking of it says — *ista est valde notabilis lex et habet materiam quotidianam et legitur duobus modis, &c.* — That Law is a very remarkable one, and furnishes daily Matter, and is read two Ways, &c. —For my Part I make no doubt but that the sense was, the Donation after Conviction shall be of no Force ; that this was the Meaning, also sufficiently appears from a kind of Version of it made by the *Greeks*—Τὴ δωρησαμένους κεφαλικῶς καὶ ἀδικασθέντες αἱ παρ' αὐτῶν τὸ ἀμάρτημα γενόμεναι δωρεαὶ ἐκ ἰσχύοςιν—thus in the *Basilics* ;* to wit, if the Donor be condemned to capital Punishment, the Donations made by him after Commission of the Crime are void. Whence I am also of Opinion, that the *Greeks* read in the very Digests, *non valent*—and as to the

* lib. 47. tit. 1.

the Word *nisi*, it is inserted in the very *Taurelian* (a) Edition of the *Florentines*, as well as in the subsequent ones, after a doubtful Manner ; and certainly whoever is of Opinion that this *Archaism* ought to be retained

* Vid. Cujacium *Observat.* 3. cap, 38. Alberic, *Gen-til.* de libris *Juris civilis* cap. 3.

* Priscianus lib. 13. et Donatus *ibi.*

here, * as it often is in other Places, must allow it to be right, to wit, if the Word *nisi* be here divided into *ni* and *si*, that is the *non si* of the Antients (for Grammarians, * grant *ni* may be used for *non*) the Sense will be plain, *non valent Donationes*, which were the Words of the Imperial Constitution, to which *Marcian*, for Explanation's Sake thus added, *ni si Condemnatio secuta sit*, that is, thus, *non, si Condemnatio sit secuta* : which is also conformable to the most received Law itself ; but there's no Occasion to resort to the above *Archaism*, nor would it I think afford us any satisfactory Help ; either expunge *ni*, or substitute *non*. In the printed Editions likewise of *Bracton*, there is, (tho' very injudiciously,) cited * l. 13. in *bonæ fidei C. tit. de pactis*, and it is said to be thence proved, That Conditions not immediately, but after some interval, annexed to Donations, are no Part of them ; but in the Manuscripts I make Use of, the Sense only of that Place, not the Passage itself is to be met with.

* Brac. l. 2. c. 5. f. 12. fo. 16. b.

(a) This Edition of the *Florentine Pandects*, which is one of the Glories of the Press, was set out by *Fran. Taurellius*, and printed at *Florence* in the Year 1553, under the Sanction of the Pope, the Emperor *Charles* the 5th, *Henry* the 2d. King of *France*, *Edward* the 6th, King of *England*, and *Cosmi Medicis* Duke of *Florence*.

S E C T. II.

The Reading and Sense of the above Authors, with regard to the *Lex (a) regia* contained in the Pandects l. 1. tit. *de constitutionibus principum*, considered, even as we find it there, is very singular and extraordinary.

NOW of all the Instances which *Bracton* gives us out of the Pandects, tho' not expressly mentioned, of the foregoing Use made by our own Lawyers at that Time of the Imperial Law, that, concerning the Princely or Regal Power, is the most remarkable.* *Nibil aliud potest Rex in teris, cum sit Dei Minister et Vicarius, nisi id solum quod de jure potest. Nec obstat quod dicitur, Quod Principi placet § legis habet vigorem, quia sequitur in fine legis, Cum lege Regia quæ de Imperio ejus lata est, id est, non quicquid de voluntate regis temere præsumtum est [sed animo condendi jura]*—The

* Brac. l. 3. de
Action. c. 9. f.
3. fo. 107.

§ L. 1. D. tit.
de Constit. Prin-
cipum.

(a) The *Lex Regia*, which *Selden* treats of in this and the subsequent Sections of this Chapter, was enacted, when the People of Rome submitted themselves wholly to the Government of one Person, viz. *Julius Cæsar*, after the Defeat of *Pompey*; or, to *Augustus* after the Death of *Julius*. By this it came to pass, that the Prince alone could not only make Laws, but was esteemed above the coercive Powers of them. *Wood's Inst. Civ. Law*, p. 95.

See Dr. *Taylor's Elements of the Civil Law*, chap. *Lex Regia*, p. 236.

King says he, as being God's Minister and Vicegerent, has no right to do any thing on Earth, but what he can do according to Law, notwithstanding it's being said, that the Pleasure of the Prince has the Force of a Law, because at the End of the same *Lex Regia*, there follow these Words. *Cum Lege Regia quæ de Imperio ejus lata est*, with the *Lex Regia* enacted concerning his Power, that is, not whatsoever is unwarrantably supposed to be the absolute Will of the King, [but what is resolved on with an Intent of enacting Laws] (these last Words, though they primarily relate to the Matter itself, yet they in this Place are redundant, and are neither in the Manuscripts of *Bracton*, which I make Use of, (a) nor in *Thornton* or *Fleta*) *Sed quod Consilio Magistratuum suorum Rege auctoritatem præstante, et habita super hoc deliberatione et tractatu recte fuerit definitum*, but what, with the Advice of his Counsel and after Deliberation and a thorough Debate concerning the Point, the King thereunto giving his royal Assent, shall have been lawfully enacted. To this Purpose, and almost in so many Syllables, *Fleta*, * *quia sequitur cum Lege Regia quæ de Imperio ejus lata est*:—*Thornton* also having thus added the like Reason—*quia sequitur in fine Legis quum lex regia* (for so the Manuscript has

* *Fle. l. i. c. 17.*
f. 7. fo. 17.

• (a) Nor are those Words in the Manuscript of *Bracton*, which is in the Library of the Society of *Gray's-Inn*.

it instead of * *lege quæ de imperio ejus lata est, et non quicquid de voluntate Regis temere præsumptum est, &c.* — From all these Passages two Things are indeed chiefly to be observed, and the last not without great Surprize. The first is, that in the Judgment of all these Authors, the Imperial Law was of such Weight in discussing that famous and most important Question relating to the King of *England's* Prerogative, that whatever could be offered out of it, as being allowed of Authority or of common Custom, was looked upon to stand necessary in need of some Answer or Interpretation, and therefore to be of Force in Matters, on which the Hinges of the Government of the Common-Wealth or People of *England* turned. And the last is, that every one of these Authors, if I at all conceive their Meaning, both read and understood that Law, quoted out of the *Pandects*, quite otherwise, than I believe it was either read or understood by any of the *Greek* or *Latin* Writers. That *Lex Regia* is from *Ulpian* inserted both in the || *Pandects* and * *Institutes*—*Quod Principi placuit* (thus in both Places) *legis habet vigorem; utpote*, (but *utpote* is wanting in the *Institutes*) *cum Lege regia, quæ de Imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat*, as it is in the *Florentine* Edition; others having *contulerit* instead of *conferat*, and likewise some Copies of the

* Thornton Par.
2d. c. 12.

|| ff. L. 1. tit. 4.
de Consti Principum. lib. 1.

* In. lib. 1. tit.
2. de jure Nat.
f. 6.

Institutes have *concedat*, others *concesserit*, *et concessit*, for *conferat*. Where *cum* (which in the most correct Edition of *Cujacius*, and in some others who freely follow that, is also read *quum*) is plainly to be taken for a causative Conjunction, subservient to the Verb *conferat* or *contulerit*, or to the Word *concedat*, *concesserit*, or *concessit*. *Justinian* himself likewise elsewhere * says, *Lege antiqua quæ Regia nuncupabatur omne jus omnique Potestas populi Romani in Imperatoriam translata sunt potestatem*—All the Right and Power of the *Roman* People is by the antient Law, which was called *Regia*, transferred to the Imperial Power—And *Arcadius Charisius* † says, *Regimenta Reipub. ad Imperatores perpetuo translata esse*—The Government of the Republic is for ever transferred to the Emperors, hinting at this *Lex Regia*, which is in the *Code* also called *Lex Imperii* † *et augustum § Privilegium*—The Law of the Empire, and the August Privilege. *Pomponius* also tells us—|| *Constituto Principe, datum est ei Jus, ut quod constituisset ratum esset*—A Prince once constituted, has a Right given him, by which whatever he decrees is rendered valid ; but the *Greeks* for the most Part omitting that Reason of *Ulpian*s speak here more fully *Ὁπὲρ ἀρέσει τῷ βασιλεὶ νόμος ἐστίν*, The King's Pleasure is a Law — that is, if he at that Time has the enacting of a Law under Contemplation. Thus elsewhere in the

* C. lib. 1. Tit. de vet. jure enucleando L. 1. f. 7. Cum. itaque.

† D. lib. 1. Tit. 11. de Offic. præfecti Rætorio L. 1.

† C. lib. 6. Tit. 23. de Testamentis L. 3. ex Imperfecto.

§ C. lib. 6. Tit. de caducis tollendis f. 14. hæc autem:

|| D. lib. 1. tit. 2. de origine Juris. L. 2. f. 11.

(a) *Basilics* || and in *Harmenopulus*, § whence || li. 2. tit. 6.
 τ βασιλέων δόγματα * the Edicts or Decrees of § li. 1 tit. 1.
 Princes are with them a Part also of the * Mic. Pfellus in
 Civil Law. But *Theophilus* a more antient synopsi. Juris.
 Author in the Place where after these three,
 the People, the Plebeians, and the Senate,
 he makes the Roman Prince the fourth
 Author, concerned in enacting a Law, says, † † Instit. de jure.
 καί τί, ἐσὶ βασιλεὺς; ἐστὶν ὁ καὶ τὸς τῶ ἀρχὴν παρὰ τὸ δῆμον natural. Gent.
 λαβῶν. —and what is a Prince? A Prince is a et civili.
 Person, who receives from the People Power
 to govern. The aforesaid Writer, as well
 as *Ulpian*, thus understood the *Lex Regia*.
 And the *Scholiast* there on this Place βασιλεὺς
 νόμιμος, a lawful Prince, to wit, one to whom
 such a Power is granted. Whence in the
 Epitome of *Leo*, and *Constantine*,* an Em- * Tit. 2.
 peror is called ἐνομος ἐπιστάσια, a lawful Præfec-
 ture. But to me it appears plain, that each
 of our before mentioned *Triumvirate*, so
 read this Place, that they did not doubt but
 that the whole Sentence or Sense ran thus,

(a) The *Basilica*, or *Jus Græco-Romanum*, composed in the
 9th and 10th Centuries, in Emulation of *Justinian* by
Basilus Macedo, Imp. and his Sons, *Leo* & *Constantine*.

It was a Collection of Law for the Use of the Eastern
 Empire, compiled out of the several Greek Versions of
Justinian's Corpus and other books of Law, which pre-
 vailed in those Parts: was published in sixteen Books
 by *Annib. Fabrotius*, Gr. Lat.

These Books were never received in the West, and are
 consequently of no Authority there, but however have
 their Use and Value in comparing and explaining.
Tayl. Elem. of the civil Law, p. 23. See also *Ayliff's Preli-*
minary Discourse, p. 33. &c. *Bev. Hist. Civ. Law*, p. 103.

— *Quod Principi placet Legis habet vigorem, cum Lege Regia quæ de Imperio ejus lata est.* And both *Bracton* and *Thornton*, expressly give Room enough to understand, that the above Law ended with those Words ; so that they, as well as the Author of *Fleta*, take *cum* to be a Preposition, not a Conjunction, and that the Sense is, that the King's Pleasure has indeed so far the Force of a Law, as his Will legally comports with, and may be weighed with the *Lex Regia*, enacted concerning his Power or Government, and that it should be no further of Force, than as it is conformable to the said Law, neither is any Thing otherwise to be determined concerning that power of the Royal Will, but what is particularly allowed of by all the Conditions and Restrictions of that *Lex Regia*, without which the supream Power was not conferred, as appears by what is there immediately added concerning our peculiar Prerogative of enacting Laws in a parliamentary Manner, as well as of distributing Justice according to Law ; neither do these Authors seem at all in that Place to have acknowledged the Fact concerning — *Imperio et potestati omni a populo concessa* the whole Authority and Power having been granted by the People by that Law, any more than if no such Matter had been mentioned in their Manuscripts. It is certainly evident, that the learned here, as well as in

in other Nations, had in *Bracton's* Time, and much more afterwards, compleat Copies of the Digest, and that they were, as well as other Books, usually transcribed; this, had we no other Proof (which however we do not want as is hereafter shewn) is very plain from the Examples *Bracton* brings of the Forms of Contracts, where he speaks of transcribing || the Code, and Digest, as of a Matter exceedingly common among us. It is hence the more surprizing how it should have happened, that not only this Author, so eminent for his Knowledge of the Law, and who was, if we may give credit to the Biographers* of the *English* Authors, Professor of both Laws at *Oxford*; but that *Thornton* also, otherwise extremely well skilled in the Law, as well as the Author of *Fleta*, should have, in their Explanation of that most famous Place in the Imperial Law, without the least scruple allowed of a Reading and Sense so different and so remote from that of all other Interpreters; though they at the same Time, with regard to the Matter itself which they treat of, as well as with respect to the Constitution of the *English* Nation, without taking any Notice of the Words of *Ulpian* or *Justinian*, intermix what is very conformable to Truth, and what is generally received, being understood as it ought to be, of Parliaments; concerning which see also *Bracton* in his *Proemium*. I have

|| *Brac.* l. 2. de
acquir. dom.
c. 6. f. 1. f. 19.

* *Baleus.* Cent.
3. *Scip.* 98.
Pitfeus art. 13.
scip. 335.

moreover by me an antient Manuscript Commentary on the Book called *Britton* (tho' in an old Account prefixed of the Tracts of the Volume in which it is contained, it is as was mentioned in the foregoing Chapter, called *Bracton* of the Laws of *England*.) In the Beginning of which Manuscript, the very same Sense is given to the Words, *Quod Principi placuit*, &c. as *Bracton* understands them in.

S E C T. III.

The various Opinions of the cotemporary Interpreters, concerning the aforesaid *Lex Regia*.

NOW it ought, with regard to the Reading and Sense we find in other Authors of this most celebrated *Lex Regia* contained in the Body of the Imperial Laws, to be observed; that the same Law, as quoted above out of *Justinian*, is in some Copies of the Digests as antient and even of a Date prior to *Bracton*, differently read, and this too approved of by some Interpreters.

|| Odofredus, ad.
l. 1. tit. de con-
stit. Princ.

Odofredus || Cotemporary with *Bracton* read in his Manuscripts — *Utpote cum Lex Regia lata est, populus ei et in eum Imperium et Potestatem conferret*. Inasmuch as when the *Lex Regia* was enacted, the People gave unto him and conferred upon him the

the Government and Power. So that the Words *omne suum* were omitted, and *Odo-fredus* elsewhere says, in *litera est, concessit* † *et hæc est bona litera*. But the Sense of that Law, according to the Interpreters cotemporary with *Bracton*, and those who preceded him after the revival of the Imperial Law in the West was various, for even at that Time there were Persons of Opinion, that by that Law all Kind of Authority and Power was by the Roman People so entirely transferred to the Prince, as to maintain, that the People were thereby wholly stripped and divested of all Manner of Power and Government. Others, § *Hof-tiensis* tells us, say *Quod nec populus nec Senatus potest Hodie condere legem generalem, sed tantum Princeps, quod verius credo*—

That neither the People or Senate can at this Day make a general Law, but the Prince alone, which Opinion says the afore-said Author I believe to be the truest.

Accursius § writes to the same Purpose. And *Martinus*, if I am not mistaken, was of that Mind. And we shall by and by speak more concerning this Opinion. Others thence indeed concluded, that the Power and Government was conferred on the Prince to enact whatever Laws he pleased, but nevertheless in such a Manner, that the Power of the People was not at all diminished by that Concession, and that the Authority, not only of the antient *Plebiscita* and *Senatus Consulta*, but even that of the

† Sic apud Ange-lum Perus. ad d. et. legem et vid. Francif. Conn. Juris Civilis. l. i. c. 16, et edit. Instit. Cujacia-nam & Baudozi-anam tit. de Jure Nat. s. sed et quod.

§ Summ. tit. d. Constit. princ. s. 9

§ Gl. ad. D. tit. de legibus l. 9. non ambigitur,

§ Summ. ad C.
tit de legibus et
Constit. Princi-
p. 8.
† Locis citatis.
‡ ad dict. legem

† Videfis Jo.
Quintin. in Ari-
stocratic. Chris.
Civitat. tit. de
Regis Imperio.

subsequent ones, was as heretofore, to remain entire; to wit (which may justly be wondered at) that as to this Matter, the Prince, the People, Senate and Plebeians, should alike share an equal Power. This is plain enough from § *Azo*, *Accursius*, *Hof-tiensis* † and *Odofredus*, ‡ who were either somewhat older, or cotemporary with *Bracton*. And this last Opinion took its rise partly from those Authors in this Place mistaking the *Lex Regia* for the *Lex Hortensia*; partly also, and perhaps chiefly, from this, that in the aforesaid Age, some Professors and learned in this Law, which had not long before been revived in the West, were under Apprehensions, lest, if in Consequence of that Law they had attributed to their Princes all the Power which those who favoured the first Opinion allowed them, they might have too much incurred the Displeasure of the People and Citizens, enjoying every where their Liberty and antient Customs, widely different from such a Power; and that they should not in this Case with sufficient Prudence have taken Care of the Rights of their own Profession, lately revived amongst them.. The Controversy too which had in those former Ages been carried on between the *Martinians* (a) and *Bulgarians* † concern-

(a) Called so from *Martin* of *Cremona*, and *Bulgarus*, his Opposer, who studyed in the University of *Bononia*, and lived in the fifteenth Century, in the Reign of *Frederick Barbarossa*.

ing

ing the Power of the Prince, grounded on this Law, is very well known. Now four hundred and twenty-two Years after the Foundation of *Rome*, or three hundred and thirty || Years before Christ, a Law was during the Dictatorship of *Q. Hortensius*, enacted, that *Ut † eo jure quod plebs statuisset, omnes Quirites tenerentur*, that the whole Roman People should be bound by whatever Law the Commons had made. Hence according to *Pomponius*, it came to pass, that *species ‡ constituendi interessent, potestas autem eadem esset*—although there was in the Manner of constituting the Laws some difference, yet the obliging Power of them, whether they were Laws which had been made by the antient Kings, Senate, or otherwise, and by the Plebeians, was always the same. And *Justinian* † tells us, that hence *Plebiscita non minus valere quam leges cœpisse*: The *Plebiscita* began to be of equal Force with the (a) Laws; though we read in *Livy* || that about one hundred and twenty Years before the *Lex Hortensia*, *L. Valerius* and *M. Horatius*, (b) being Consuls, *Om-*
nium

|| *Epist. Liv. l. 11.*§ *Lælius Fælix*
apud Agell. l. 15
c. 27.† *D. Tit. de origine Juris. l. 2.*
l. 8. Deinde.‡ *Inst. de Jur. Nat. Gen. Plebiscitum.*|| *Liv. Dec. 1. l. 3. c. 55.*

(a) i. e. Those which the People of *Rome* established upon the Recommendation or Request of *Senatorial* a Magistrate. A *Plebiscite* was that which the Common People enacted at the Request of the *Tribune* or other *Plebeian* Magistrate. *Wood's Civil Law. p. 94.*

(b) The Commonalty of *Rome* assembled at Mount *Aventine*, having abolished the arbitrary and tyrannical Government of the *Decemviri*, *Lucius Valerius* and *Marcus Horatius*

nium primum, quum veluti in controverso jure esset, tenerentur ne patres plebiscitis, legem, centuriatis comitiis, tulisse, ut quod tributim plebes jussisset, populum teneret—

When it was as it were a controverted Point whether the Fathers were bound by the Ordinances of the People, a Law was made in the *Centuriata Comitia*, that whatever had been ordained by the Plebeians in the *Tributa Comitia*, should oblige the whole Roman People. — But the Reason brought here by *Accursius*, *Odofredus*, and others out of the *Lex Hortensia*, is indeed extraordinary. Here follow *Accursius's* Words — *Regia, scilicet lata ab Hortensio mirabili oratore, ut supra de Origine Juris l. 2 § deinde cum esset. Sed de populo et plebe ibi dicit. Dic ergo heic Regia, id est, Regali.*—By the *Lex Regia*

Horatius, were created Consuls; and at this time (it be- in some Measure a Moot-point in Law, whether the Fathers were bound by the Ordinances of the People) the first of these Persons made a Law, ordaining, whatever the Commonalty commanded in the *Tribes*, should oblige the whole Roman People. This Law, called the *Horatian* * Law, was afterwards confirmed by the Dictator *Quint. Publilius*; and from him styled the *Publilian* Law. But it being revived by the Dictator *Quint. Hortensius*, when the Commons, by a third Mutiny, retired to Mount *Janiculus*, it was from him term'd the *Hortensian* Law.

See *Ayliff's* Preliminary Discourse on the rise of the Civil Law, p. 12.—*Bever's* History of the Civil Law, c. 6. p. 13.

* This Law is by many Authors called *Lex Valeria et Horatia* from both the Consuls.

See *Rivall: Hist. Jur. Civil.* p. 201. — *Kennet's* Antiq. p. 152.

Regia, to wit, that made by that wonderful Orator *Hortensius*, as above of the Origin of the Law, l. 2. § *deinde cum esset*. But he there speaks of the People and Plebeians. Say therefore here *Regia*, that is, Regal. He acknowledges, as indeed he was obliged to do, that in the *Lex Hortensia*, there is no Mention made of any other Power than that of the People and Plebeians, or of the Senators and Plebeians. How then comes it to pass, that any Thing is there prescribed concerning the *Lex Regia*, *Dic ergo regali* — Say therefore, says he, the Regal, where his Meaning, if I understand it, is, that the *Lex Hortensia* made with respect to the regal Authority, that is the Right of ruling or governing, having granted an equal Power both to the Plebeians and Senate, (of which two Parts or Orders the entire Body of the Roman People then consisted) is to be in like Manner thus understood, that it must, as well for the same Reason, as from the Sense of that Law, be admitted that the Prince once joined to the People, is, he being considered as a third Part of the Government, of course invested with an equal Power; for I can see no other Reason, why these antient Authors should have given the *Lex Hortensia* any Place at all here. And it was on this Account, that those who were of this Opinion, interpreted what *Justinian* mentions with regard to the singular Force of the *Plebiscita* and *Senatus Consulta*, as if from his Words

† Odofred. ads
dic legem et vide-
fis ibi Raphaeli
Fulgosium, &c.

Words, the very same Power and Authority, which the free Common-wealth formerly enjoyed in enacting of Laws, still subsisted with the Roman Senate and People. They likewise debated, whether the Power thus granted by the People could be lawfully revoked, as being an Authority with which the delegating Power † had invested the delegated.

S E C T. IV.

Which is that true *Lex Regia*, and what its Nature is.

NOTHING is more evident than that the first Opinion, to wit, That the People, were by the *Lex Regia* manifestly stripped of all Authority and Power in enacting Laws; is true, and this is clear, as well from *Justinian* himself, as from the most eminent antient and modern Interpreters. The very Words before cited out of *Justinian* concerning that Law sufficiently prove this; to which, what follows of *Constantine*, ‡ may be added—*inter æquitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere*—It belongs to and is lawful only for us, to interpret between Equity and Law; the *Greeks* read † μόνῳ νόμον τεμνέτω ὁ βασιλεὺς, Let the Prince alone determine what is Law, and,

|| C. tit. de legibus
l. 1.

† Basilic. l. 2.
tit. 6. l. 6,

and that also of Justinian § to Demosthenes *Præfectus Prætorio—Si imperialis majestas causam conditionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino Judices qui sub nostro Imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est sed et omnibus similibus. Quid enim majus, quid sanctius, &c.* — If the Imperial Majesty should conditionally examine a Cause, and pronounce Sentence, the Parties concerned being present, Let all the Judges under our Jurisdiction know, that this is a Law, not only with Respect to that cause for which it was made, but also in all like Cases; for what is greater, what more sacred, &c. A most antient French Manuscript Translation of the Words of the *lex Regia* out of *Ulpian*, may be here, as to this Point, produced to corroborate the Opinion of some of the antient Interpreters above cited—*Ce que plest au Prince a force de loy, pur ce que li peuples li ottoia en la Loy royall que fu fait de l'empire tout le commandement et toute le poeste que il avoient et le mistrent sus lui et en lui.* The Princes Pleasure has the Force of a Law, because the People by the *Lex Regia* made concerning Government, granted unto him all their Authority and Power, and placed it on, and in him. How the more common modern Interpreters mentioned by us understand that Place, is obvious to every one. The most learned and correct of them acknowledge, that the *Lex Hortensia*, which the Antients in this Place, without any Grounds so wrested, does

† C. tit. de Legibus. l. 12. et vid. Basilic. lib. 2 tit. 6. l. 17. et vid. l. 3 C. tit. de Crimine Sacrilegii.

* Alciat. ad tit
de Verb. Signifi.
l. 15. Jo. Coraf.
Miscell l. b. c. 8.

† Antiq. Rom.
l. 2.
§ In. Notis ad
leges et Senatus
Consulta pag. 42.
|| D. li. 11. Tit.
de Mortuo infe-
rendo L. 2.

Dio. Cass. l. 53.

* Sueton. in Oc-
tav. c. 27.

not at all, with regard to this Matter, concern, nor even so much as point at the *Lex Regia*; in some of which Authors * also, *Lege Remnia*, instead of *Regia*, is inserted. Now it is plain to every one that a Law may for two Reasons be called *Regia*, to wit, either on Account of its being enacted by the King, or concerning him, or the regal Power. There are in *Dyonisius Halicarnassæus* † a great many *Regal* Laws of the Romans, which are also carefully set forth by *Fulvius Urfinus*. § There is likewise Mention made in the Code || of a *Lex Regia*, enacted by some antient King, concerning the interment of pregnant Women; but it is plain, that it is in this Place called *Lex Regia* in the last Sense, and is justly taken for that Law (for other Opinions are to be quite rejected) by which the Roman People transferred all their Authority and power to *Octavius Augustus Cæsar*, and his Successors without the least reserve to themselves of their antient Power; concerning which Matter, *Dio Cassius* ‡ indeed in his History, of *Augustus*, treats pretty fully, as well as *Suetonius*,* who in his Account of the same Emperor says, that *Tribunitiam potestatem perpetuam recepit &c. recepit et Morum Legumque regimen æque perpetuum*. He had the perpetual tribunitial Power, as well as the perpetual Government of the Customs and Laws conferred on him, &c. And there is moreover a Table of Brass in the Church of St. John of Lateran at Rome, or from thence removed to the Capitol, in

which a fragment is to be seen of the very *Lex Regia* itself, inscribed to the Emperor *Vespasian*, by which it is easy, with respect to this Point, to find out the Sense of this *Lex Regia* as set forth by *Ulpian*. We likewise, among other Heads concerning the supreme and sole Government confirmed, according to that Author, by the People to *Vespasian* as hereditary, to wit, to be enjoyed by him after the same manner as *Augustus*, *Tiberius*, and *Claudius*, possessed them, in the same Writer read what follows, *Utique quæ ante hanc legem rogatam acta, gesta, decreta imperata ab Imperatore Cæsare Vespasiano Augusto, jussu Mandatoque ejus à quoque sunt, ea perinde juxta rataque sint ac si populi plebisve jussu acta essent*—Moreover, whatever Acts, Transactions, Decrees, passed by the Emperor *Cæsar Vespasian Augustus*, or by any one, by Virtue of his Command or Mandate, before the enacting this Law, were to be as just and firm, as if they had been enacted by Order of the People or *Plebeians*. The entire fragment (a) is set forth in *Janus Gruterus*, † *Fulvius Ursinus*, † *Antonius Augustinus*, § *Franciscus Hotomannus*, || *Barnabas Brissonus*, † and others, And many of the later Interpreters agree, that this *lex Regia* contained in *Ulpian* or *Justinian* must be understood in the foregoing Sense. Besides those who have wrote whole Volumes, either on the Title of this Law

(a) The Fragment of this Law is likewise published in *Dr. Taylor's Elements of the Civil Law*. See Chap. *Lex Regia* p. 236.

† Jan. Grut. In-
scrip. p. 242.

† F. l. Urs. In
leg et Senatus Con-
sultis marmoreis,
§ Ant. Augus. de
legibus. p. 125.

|| Fran. Hotoman
Antiq. Rom. l. 1.
tit. R.

† Bar. Brif. for-
mul. l. 2.

* Jo. Coraf, mis.
Juris. l. 6. q. 8.

† Lud. Charon
Pithanon l. 1. c.
2.

§ Pet. Tholo-
sanus Syntagma
Juris l. 47. c. 20.

|| Fran. Conar.
Comm. Jur. civil.
b. 1. c. 16. vid.

item. Emund.
Meill observation
l. 2. c. 19.

‡ Fran. de Ama-
ya l. 1. c. 1. f. 19.
&c.

Law in the Digest and Institutes, or on Em-
pire and Jurisdiction, consult *Augustinus* and
Hotomannus in the Places before referred to,
As also *Joannes Corafius*, * *Ludovicus †*
Charondas, *Petrus § Tholosanus*, *Franciscus*
|| Connanus, but above all *Franciscus de*
Amaya ‡ in his Observations, wherein he
treats largely of this Matter ; but these by
the by.

SECT. V.

In what Sense our Lawyers in that
Age thus applyed the Civil Law,
and particularly the *Lex Regia*.

IT is moreover plain from the above
Places cited by our most eminent Lawyers
out of the Imperial Law, to wit, the Au-
thor of *Fleta*, *Bracton* and *Thornton*, (the
two last having been at the Helm of Justice)
thus by them quoted, expressly pointed at
and produced as Proofs and Arguments
with Regard to the Matter they handled,
and which they offered, either as carrying
Authority with them, or as having at least
the Force of a weighty Reason ; that some
Kind of Use, not very difficult to be dis-
covered, of the Imperial Law and of the
Books containing it, prevailed among our An-
cestors in that Age in Decisions that were to
be determined by the Law of *England*. Not
that they thought this Realm subject to the
Roman

Roman Emperors, or to the Imperial Law ; or that our Policy any way depended upon it, or that the Law of *England*, which had long before been established either in writing, or by Custom, could receive any Alteration from it, they themselves in several Places informing us that our own Law, where it widely differs from, and even is plainly repugnant to the Imperial Law, is to be followed ; but all they meant was, that where an express Rule was wanting in our own Law, Recourse might then be had to the Rule of the Civil Law, as far as grounded on Reason : And when both Laws were conformable to each other, that then the Matter in debate was in some Measure confirmed or explained by the Words of the Imperial Law ; which Practice we are certain has been in former Times, as well as now, followed by other Western Nations. And doubtless that Passage out of *Ulpian*, concerning the *Lex Regia*, could not merely from its own Authority have any Share in deciding that famous Question among us, relating to the Royal Perogative ; since, with regard to our public Government, the Imperial Law could of itself have no Manner of Force ; neither indeed is that Place out of *Ulpian*, cited in any other Sense by our own Authors here named, than as they, however mistaken, considered the same as we have shewn, either as conformable, or at least not opposite to, but easily suited to such Customs of our own Nation, as were

E always

always in Use among us. But the true Sense of that Passage as above set forth, considering it as a Part of the Imperial Law, is quite opposite, not only to the Constitution of the *English* Government, but likewise to that of most of the Christian Republicks throughout *Europe*; that Law having manifestly transferred all Kind of Power and Authority to the Roman Prince, that is to say, all that could be conferred on a Prince, to enable him to govern a free People without Tyranny. *Cujacius* ‡ in a few Words explains the Matter itself — *Augusto illa privilegio eadem est Potestas principis quæ populi fuit* — the (Roman) Prince has by that august Privilege the same Power the People enjoyed. — Some other very learned Men speak to the same Purpose. Neither indeed had the Plebeians or Senators any other Power after the *Lex Regia* was enacted or put in Practice, than what the Emperors themselves were pleased to grant them, Many Writers * likewise endeavouring to adapt the imperial Law to that of their own Country, labour to make it appear, that the Translation, or rather according to them, the Communication of Empire, was by various Compacts and Conditions so moderated, that they, as far as I can see, make no great Difficulty widely to dissent from *Ulpian* and *Justinian's* Meaning, at the same Time that they profess themselves their Interpreters, that is, in attributing another Power to the antient *Cæsars*, every Way unsuit-

‡ Cujac. In Paratit. D. li. 1. tit. 1. c. 4.

* Videfis Fran. Suarez. Defens. Fidei Catholicæ advers. Anglos l. 3. c. 2. f. 12. Fran. de Amaya Obser. Juris l. 1. c. 1. f. 45. &c. Tobiam Baurmeister l. 1 de Jurisdictione Imp. Rom. c. 19. f. 7. &c.

suitable to them, (their Manner of governing not being to be looked upon as a Rule for that of other Princes) and much inferior to that which Roman Antiquity acknowledges their Emperors to have been invested with. Neither are those Authors more in the Right, ‡ who are of Opinion that several *Leges Regiæ*, and those various too, were enacted by different Roman Princes; and that there was, as was before observed, more than one, either enacted concerning this Matter, or held as such. And they too inconsiderately censure that Opinion of all Empires having been, as has been said, conferred, as far as transferrable, on the *Cæsars*, always as adulatory; for certainly, whosoever should offer to a Prince any thing concerning the unbounded Authority of the antient Roman Monarchs, would be accounted every whit as great a Flatterer, as a Person who should lay before the Grand, Seignior or other such mighty Potentate, the confined Power of the old Kings of *Sparta*, or who should represent to him the Forms of other Governments, which are by various Methods curbed and restrained within narrow Limits, would deserve to be looked upon as offering an Insult to such a Power, or as aiming at lessening the Majesty or Dignity of such Princes. Neither is there in the German, which is the present Roman Empire, any Succession with regard either to the Laws of *Justinian* considered as such

* Marius Salomonius lib. de Principatu Paganin. Gaudent. Juridic. l. 2. c. 16. Et vid. Hen. Bouricium. lect. Juris c. 7. Et. Fran. Con. Comm. Jur. Civil. l. 1. c. 16. Rival. Hist. Jur. Civil. l. 2.

or to those of the antient Romans. Nor have the Chapters of the same Law concerning the Power of Princes any other Force at all there, much less elsewhere, than what is granted it by more modern Laws and Customs, and these very considerably varying; that is, as it is differently interwoven with the *Imperial Capitulation*, or the *regal Law of the German Empire*. Consult with regard to the aforesaid Capitulation and *Lex Regia*, (a) *Benedictus Carpsovius's* Treatise, published some Years since on this Subject, and on the like, among other Nations. We have judged it not improper to add in this Place, some Account with respect to the Use, such as it was, of the Imperial Law, formerly admitted in this Nation by our learned Lawyers considered in that Capacity; likewise when, how, as well as whence, such a Practice commenced, increased, and arrived to its Height, in some Measure, as is hereafter shewn, both in the Courts, Studies, and Writings; and finally, when its Use was quite laid aside; and after what Manner in the Ages, much earlier than the aforesaid Commencement, the same Law was of some, or no Force, among us. For the curious may perhaps judge the handling these Points to be of some Use, and not improper in this Place.

(a) Dr. Taylor's *Elements of the Civil Law*. Chap. *Lex Regia*, p. 236.

CHAPTER IV.

S E C T. I.

What Use was made of the Imperial Law in *England*, whilst the *Romans* governed here.

THE Use of the Imperial Law in *England* is of three Kinds.

The first regarded the supreme, and as it were the universal Government among us.

The second was adscititious only or mixed, suited to, and often from its Reasonableness affording, both in the Studies and Courts, Assistance, not only to interpret the *English* Civil and Pontifical Law; but also, where an express Rule was wanting in our own Law, or when the Imperial was, as it often happened, entirely conformable to our Law, it was then, as administering Authority, brought in merely by the Consent or Admission of those who made Use of it in our own Nation, and not by Virtue of any Power in the Enactors of the Imperial Law.

The third was confined to some Consistories and particular Causes only, to wit, to Military, Marine, and Testamentary, and therefore so limited, that that Law was not usually allowed of beyond those Bounds. Just so the *Romans* received the naval Laws of the *Rhodians*, and we, and other maritime Nations, the (a) *Oleronian*. We shall here chiefly treat of the first and second kind of Use, the third being by every one thoroughly known.

† De gest Regum
Angliae l. 1. c. 1.

The first kind of Use was only observed among us during the *Roman* Government here. Its Commencement in this Nation must be dated from the Reign of the Emperor *Claudius*; for the Monk (b) of *Malmsbury*,† and those who copy him and other such Writers, who without any Foundation assert that, *Britanniam a Julio Cæsare in latas leges jurare compulsam*, *Britain* was by *Julius Cæsar* compelled to swear Obedience to the *Roman* Laws, are by no means to be credited; for it was *Claudius*,

(a) The Laws of *Oleron* were made and declared by *Richard* the first King of *England* in his return from the *Holy Land*; they take their name from *Oleron* the Place of their first Publication; a small *Island* then belonging to *Richard* the first situate at the Mouth of the River *Charente* near the Coasts of *Aquitain*—*Dawson's* Origin of Laws p. 121.

(b) He made a judicious Collection of whatever he found on Record from the arrival of the *Saxons* to the 8th Year of the reign of K. *Stephen*, 1142. *Usher* styles him the Chief of our *Historians*. *Rapin's* Hist. v. 2. p. 472.

as *Ethelwerdus* (c) tells us, who, *Britonum Reges subjecit servire sibi*, forced the *British* Kings to submit to him, and reduced the more southern Part of the Island to the *Roman* Power. And that Use from his Time, in which the *Roman* Colonies were first transplanted hither, continued among us till the *Roman* Empire so greatly declined in *Britain*, that its Inhabitants having shook off the *Roman* Yoke re-assumed their former Power, and becoming their own Masters, entirely laid aside, or at least so neglected the Imperial Law, as such, that it quickly vanished. Some Remains however of that Law, which through Custom had been so blended with the *British* Laws as to put on their Nature, were perhaps, neither could it well be otherwise, necessarily retained.

(c) He was a *Saxon* Historian of the Blood Royal and lived till the year 1090, but did not continue his Chronicle so far. *Nicolson's English Hist. Lib. Oct. Ed. p. 122.*

S E C T. II. γ

The imperial Law was manifestly made Use of both in the *Roman Colonies* brought over into *England*, and in the Civil Administration of Affairs at that Time in this Nation.

THE Ufuage We have before described of the Imperial Law, chiefly appears in the Colonies transplanted, as we have said, hither, and in the Civil Administration of Affairs during the aforesaid Interval among us. And it is plainly enough handed down § to us, that these Provincial Colonies, for the most Part, made Use of the *Roman Law*, consequently the Imperial in Force under the *Cæsars*, and that the aforesaid Colonies, were no more than mere Representations of the City of *Rome*. And *Tacitus* || expressly tells us, that the first Colony among us, which was that of (a) *Camalodunum*

§ Vid. Agellium.
l. 16. c. 13.
Sigonius—Rof-
sinum &c.

|| Tacit. annal.
12. l. 32.

(a) The Story more at large is thus told. *Severus*, to wean his Sons *Antoninus Caracalla*, and *Geta*, from the Debaucheries of *Rome*, and keep his Legions from Idleness, came over into *Britain*; and leaving his Son *Geta* with some of his Councillors and intimate Friends, to govern the inland Parts, subject to the *Romans*, went himself with *Antoninus*, at the Head of an Army against the *Caledonians*: In which Expedition, as they were riding together, *Antoninus* stopping his horse, of a sudden drew his Sword with intent to kill

dunum had been transplanted to *Britain*, with a View, not only of being an Aid in Case of Rebellion, but, *imbuendis Sociis ad officia Legum*—likewise of training up their fellow Subjects to enable them to discharge the Duties required by the Laws—By which it is plainly insinuated, that as many of the *Britains* also as were Associates to the *Romans*, either as their Friends, or as being by the Fate of War subdued or reduced under their Power, were then to be trained up to the Offices or Observation of the Duties prescribed by the Imperial Law, and they were without doubt instructed after this Manner by that and such other Colonies. And that this Matter was easily to be brought about, is still on another Account more evident. For the antient Law, which was nothing but the Discipline of the *Druids*, (as may be concluded from *Julius Cæsar*, and the highly probable Conjectures of learned Men, who are of Opinion that that Discipline was in the Administration of all Things, sacred and profane, equally in

kill his Father ; but was prevented by the interposition and Clamour of the Soldiers. *Severus* passed this over, and stifled his Resentment till he came to his Quarters, where he ordered his son, together with *Papinian* and *Cassius*, his intimate Friends, to come to him ; and having commanded a Sword to be laid before him, reprimanded his Son for making so villainous an attempt in the Sight of the Allies and Enemies ; and said, If you are desirous of killing me, kill me here, &c.

Duck of the Use and authority of the Civil Law in England. p. 10.

force

† Suet. in Claudio c. 25. vi. Plin. l. 30. c. 1.

‡ Selden's Notes on Fortescue de laud. leg. Anglæ p. 9. &c.

force among the *Gauls* and *Britains*) that Law I say being, as it is reasonable to believe it was, taken † away by *Claudius* both from the *Britons* and *Gauls*, it became for that Reason less difficult to introduce (a) every where new Laws, consequently the imperial or those of the Conqueror. We have elsewhere, ‡ with Regard to this point, collected several other Matters relating to the Colonies of this Province. We know four or five of their names, and there were no Doubt of it many others which we judge needless to repeat in this Place. Now the civil Administration of Affairs among us under the *Romans*, in which the first Kind of Use of the imperial Law prevailed, is plainly discernible in the *Consulary*, *Præsidial*, *Proprætorial*, Offices or Dignities of the Vicar of *Britain*, and other such Officers who were under the *Præfectus Prætorio* of the *Gauls*. And the most learned *William Camden*, who accurately treats of them out of the Antients, as well in his Account of the Dignities of the western Empire, as of those of the *Romans* in *Britain*, most expressly mentions them, as Persons governing in this Part of *Britain*

(a) Selden elsewhere observes that the *Druid's* being prohibited the exercise of their Rites, such Nations as were governed by them in Point of Law, viz. the *Gauls*, *Britons*, &c. grew regardless of their authority; and not respecting them as before, became prone to receive and embrace the Roman Law. *Seldens Notes on Fortescue* p. 11, 12.

accord-

according to their own laws. And what *Julius Cæsar* says of *Gaul*, may also it is evident be applyed to *Britain* in the State in which it was at that time—*Respicite * finitimam Galliam quæ in Provinciam redacta Jure et Legibus commutatis perpetua premitur servitute.* Behold says he the Neighbouring *Gaul*, its Rights and Laws being altered, reduced into a Province, and kept under perpetual servitude, but we find the most memorable Instance of all in the reign of *Septimius Severus Augustus*, who divided, according to *Herodian*, † about the Year of Christ two hundred, *εἰς δ' οὐδ' ἡγεμονίας τὸ τὸ ἔθνος ἐξέσταν* the Empire or Power of the Nation into two Principalities or Præfectures, which some learned men take for two Governments § or Prætorian Præfectures, that is two Præfectus Prætorios, each of which were in their respective Præfectures, to decide according to the Roman Law. The same Emperor likewise, afterwards bringing with him into *Britain* his two Sons the *Cæsars*, *Bassianus* and *Geta*, they being his appointed Successors, with a View of removing them from the Luxury of Rome, placed *Geta* his youngest Son at the Head of the Judicature in this Nation, after having assigned him out of the oldest or chiefest of his Friends Associates. *Herodian* || tells us as much, for he says that *ῥέταν καλαίπῶν 3· ἐν τῷ ὑπο Ρωμαίων ἔθνει δικασοῖτ' αὖτε καὶ τὰ λοιπὰ διοικήσαντα πολιτικῇ τῆς ἀρχῆς (δὲς αὐτῷ συνέδρους*

* Cæf. Commen. de Bello Gallico 1. 7.

† Herodian. Hist. 3.

§ Richard. Vltus Hist. Brit. l. 5. Not. 11. De Regimenti voce consulas Charifm D. tit. de Præfect Præt. et. Festum in verb. Regimen

|| Herodian Hist.

τὴν οὖν τὰς πρεσβυτέρους) τὸν δὲ Ἀντωνίνον παραλαβὼν ἐπὶ τὰς βαρβάρους ἠπείγῃ, The Emperor, having left *Geta* in that Part of the Nation subject to the Romans, to decree Justice and Administer the other civil Affairs of the Government, when he had assigned him out of the most antient of his Friends senators or Associates or Councillors, took with him *Antoninus*, that is *Bassianus*, (tho' both of them were in reality even in their Fathers life time called by this name) against the *Barbarians*. And indeed this *Geta* was, as *Spartianus* * says, *Moribus asperis sed non impiis, et tractator literis assequendis et tenax veterum Scriptorum et paternarum etiam Sententiarum memor*—Of a severe, though not impious, Disposition, and a Tractator, which is as much as to say, a scholastic, and in his Pursuit of learning both tenacious of the Opinions of antient Writers, as well observant of his Fathers Councils. So much therefore of *Britain*, as was at that time under the *Roman Power*, or that Part South of the Wall or Trench of the *Picts*, which runs across *Cumberland*, was, as to its civil Administration and Distribution of Justice, subject to *Antoninus Geta*, he being then the *Præfectus Prætorio*, or next to the Emperor, and a sharer in the Government here.

* *Spartian.* in *Antonino Ge.a.*

SECT.

S E C T. III.

Papinian, styled the Prince of anti-
ent Lawyers, was at the Helm
of juridical Affairs in *Britain*,
and determined Causes at *York*,
and in other Parts of *Britain*,
according to the Imperial Law :
in which Station *Ulpian* and
Paulus also were, as well as some
others of the same Profession
their Cotemporaries.

NOW among the aforesaid Collegues or
Councillors, as well as the Assistants
to the Emperor himself, who, being very
learned in the Law, commonly gave daily †
Audience with respect to Points concern-
ing it from Morning till Noon ; it seems
to be past all doubt, that *Æmylius Papini-*
anus had among us the chief Place, as be-
ing in the Opinion of the Antients the Asy-
lum of the Law, or (as *Cujacius* § judged
him to be) the most learned Lawyer of his
Time, or that ever was, or would be. (a)
His Authority before the reign of *Justi-*
nian was so superior to that of all others,
that

† Xiphilinus e
Dionis lib. 76.

† Cujac, in Epist.
ad Bodinger. præ-
fix. Codici Theo-
des. quem. et vi-
desis in præfat.
ad Papinian op-
ra.

(a) *Baldwin* an eminent Commentator on the Civil
Law admonishes all Persons to revere the divine Pro-
vidence, for having raised a *Josephus* in *Egypt*, a *Daniel*
in *Babylon*, a *Pericles* at *Athens*, and a *Papinian* at *Rome*.
Ayliff's Prelim. Discourse. p. 23.

§ C. theodof. 1.
1. tit. de re-
sponfis prudentum

§ Spartian. in
Antonino Cara-
calla.

|| Hifl. 76. in
Severo et vid.
Guil. Camden.
Brit. p. 572.

that where there was an Equality of oppo-
fite Judgments, that which *Papinian* was
of prevailed. || He was also a very great
Favourite of the Emperor *Severus Augustus*,
and studied with him the Law under *Cer-
bidius Scævola*; and the aforesaid Em-
peror committed his two Sons to his spe-
cial Care. It is at least most certain, that
he not only accompanied *Sept. Severus* §
into this Part of *Britain*, but discharged
likewise the Offices of the Law in the City
of *York*, in which the Emperor held his
Prætorium and Tribunal, where it is paſt
all Diſpute, that not only the Emperor
himſelf, but ſometimes *Geta* alſo with the
above-named Councellors decided Cauſes.

Xiphilinus || ſays from *Dio* thus much of
Papinian, in the place where he mentions
Baſſianus's Attempt to kill his Father on the
Road, who notwithstanding, as this Au-
thor informs us, then took no Notice at all
of it, but aſcending the Tribunal (at *York*)
and diſpatching what was neceſſary, re-
turned to the Pretorium (καλέſας τόν τε ἑαὺν
καὶ τὸν Παπινιανόν καὶ τὸν Κάροα, &c.) and then ſend-
ing for his Sons, *Papinian* and *Caſtor*, made a
Speech to *Baſſianus* concerning his horrid
Deſign; in which, ſays he, If you are de-
ſirous of killing me, kill me here, &c. but
if you reſuſe, and are afraid to perpetrate it
with your own Hand, here is (Παπινιανὸς ὁ
ἐπαρχος) the *Præfeſt Papinian* whom you
may command to kill me; for you being
Emperor, he will punctually execute what-
ever

ever you order. Thus far he. This *Papinian* was *Præfectus Prætorio*, † both to *Severus* and *Antoninus Caracalla* or *Bassianus* his Successor. As it is therefore sufficiently evident, that that *Shun* and *Asylum* of Right, as well as *Treasure of the Law*, (for so *Spartianus* § styles him, and he is indeed honoured in many Places of the *Justinian Code* with surprizing Elogiums) decreed according to, as well as taught, the Imperial Law in our *Britain*: so he may well be looked upon to have been the Chief also of the Councillors, assigned to *Geta*,* from among his most antient Friends, he then presiding here over all judicial Causes. (a) This was the Person, whose Works it was, on Account of their wonderful Sublimity and Subtility, thought a great Piece of Presumption to pretend before three Years Study to understand; from that Time afterwards, usually called *Papinianists*. But I do not find that any of the *Civilian* Biographers mention his having been in *Britain*, and not one of the antient Historians, except *Dio Cassius* (whom indeed one may reasonably Conjecture from his Writings, † to have been also an Associate here to *Severus* in judicial Causes) de-

† D. l. 12. tit. 1. de rebus creditis L. 40. Et. *Spartian*, in *Antonin*. *Caracalla*. *Fran*. *Connan*. *Com*. *Jur*. li. 4. c. 13. *Guid*. *Pauziroll* de clar. leg. Interpret li. 1. c. 55. &c. § *Spartian*. in *Severo*.

* Vide *Joan*. *Bertrand*. de *Jurpetitis*. l. 1. in *Papiniano*.

|| *Historia Juris a Justiniano compos. de ratione et method. juris docendi*. f. 4.

† *Dio*. *Cass*. lib. 76.

(a) The Emperor *Caracalla* having murdered his Brother *Geta*, would have perswaded *Papinian* to palliate the *Fratricide*, but refusing to comply with the Tyrant's Orders, he caused him to be put to Death, and soon afterwards his Son, a Youth of a promising Genius. *Grotius de vit. Juris Cons.* p. 164.

delivers this Fact. Neither is it at all improbable, that *Paulus* and *Ulpian*, as well as some other Persons of that Age, eminent for their Knowledge in the Imperial Law, formed at that Time among us a Part of the *Cæsarean* Assembly; since we find that Associates were assigned *Antoninus Geta*, out of the most antient of his Friends (and the learned know this to have been in that

† *Videb.* Claud. Age a Title (a) of singular Dignity † in the
Salmaf. in August Imperial Palace and Assembly, and not a
Hist. p. 47. & bare Honour annexed to an Office.) And
 307. 308.

|| *Lampridius* in
Alexandro Severo.
et videbis D. ii.
12. tit. de rebus
creditjs L. 40.

|| *C. lib. 3. tit.*
de rei Vendicati-
one L. 1.

Age a Title (a) of singular Dignity † in the Imperial Palace and Assembly, and not a bare Honour annexed to an Office.) And we are of Opinion, that during the Præfecture of *Papinian*, who it is evident was here, *Ulpian* and *Paul* were of the Assessorial Tribunal. || And we may without Scruple believe, that the Rescript directed to one *Cecilia*, concerning *Mancipia* justly or unjustly obtained, given at *York* by the Emperors *Severus* and *Antoninus*, *Faustus* and *Rufus* being Consuls, to wit, in the Year of Christ 210, || had its rise from, or was occasioned by some *British* Contest. Thus it appears, that the Use of the Imperial Law was in Force here, at the same Time that the above most learned and eminent of the Roman Lawyers flourished among us. And the extensive Use of the same Law in this Part of *Britain* subject to the *Romans*, is moreover hence confirmed, that when the same Emperor was at the

(a) Of the *Prætorian* Prefect, his Power and Office.
 See *Ayliff's* Civil Law, p. 166.

Point

Point of Death at York (where he expired, the Civil Government such as we have described it, having flourished above two Years † under him) he said, *Turbatam* || *se Rem publicam ubique accepisse, pacatam etiam Britannis relin quere.* That at the Time of his ascending the imperial Throne, he found the Common-wealth every where in Disorder, but that he left it settled, even among the Britons. And in Consequence of such Use as we have described of the Roman Law among us, the following Passages occur in the Antients.—*Latia sub lege Britannii.* † — The Britains under the Roman Law — And the Testimony of § Tacitus; not to mention others, to the same Purpose, is so very express, with regard to the Prevalency of the Roman Manners among the Britons, that the hither Part of Britain, should rather have been called *Romania* than *Britannia.* || The Provinces, Villages Præfectures, and Towns here, were therefore at that Time governed by this Law, agreeable whereto William Camden * speaks very truly of London, where he remarks, that that City was neither distinguished by the Name of a Colony, or a Freeburgh—*Præfecturam itaque ut opinor, constituerunt Romani sic enim vocabant Opida in quibus Nundinæ agebantur et jus dicebant, ita tamen ut magistratus suos non haberent, sed Præfecti quotannis in ea mitterentur qui jus dicerent, quod in publicis Negotiis nempe census tributorum, vectigalium, Militiæ, &c.*

|| Dio. Caf. 1. 76.
† Spartian. in Severo.

† Vet. Poet. Castalest. li. tit. 7.
§ Tacit. in vita. Julii Agricola.

|| Gildas in Epist. de Excid. Brit.

* Camden. Brit. p. 304.

à Romano Senatu peterent.—For which Reason, says he, I am of Opinion they made it a *Præfecture*, for so they called the Towns wherein there were Fairs and Courts of Justice kept, not that they had Magistrates of their own, but had *Præfects* sent them yearly to do Justice, who was to act in all public Affairs, such as Taxes, Tributes, Imposts, the Business of the Army, &c. according to the Instructions they received from the Roman Senate. — The § Freeboroughs also, if there were any such, were subject in the same Manner to the imperial Law here, as many of our Cities and Towns, which have their own Customs and peculiar Laws, are subject to what we call the common Law of *England*, for every one knows, that such Customs and particular Laws receive their Interpretation from, and are very often restrained by, the Authority of the common Law.

§ Videtur Camden
Britan. p. 572.

S E C T. IV.

The Use of the aforesaid Imperial Law, continued among us three hundred and sixty Years, or thereabouts.

NOW the Power of the Imperial Law, such as we have represented it, though some Times varying according to the different

ferent and fluctuating State of Affairs, continued among us for three hundred and sixty Years, or thereabouts, that is from the Reign of *Claudius Cæsar*; (for we justly from that Time date its Commencement, not from the Reign of *Julius Cæsar*, or of any other of *Claudius's* Predecessors, who rather aimed at the entire Conquest of, than subdued any Part of *Britain*) down to the Empire of *Honorius Augustus*, or to the Time when *Rome* was taken by *Alaric the Goth*. That is from the Year of Christ fifty, to the Year of our said Lord four hundred and ten, or thereabouts, to wit, about the Time when first * *Marcus*, then *Gratian*, and lastly, *Constantine* were, through a Defection † of the People from the Roman Power, here chosen Kings or Emperors, *Constantine* also, who had past from *Britain* into *Gaul*, being quite oppressed by the bad Success of his Affairs, and soon after killed, the Barbarians likewise from beyond the Rhine, having invaded at their Pleasure all Things, the Western Part too of the Roman Empire being so weaken'd as not to be in any Condition of succouring their Friends: Some of the *Gauls*, as well as our *Britains*, were compelled by Necessity, as *Zozymus* † says, τῆς Ρωμαίων ἀρχῆς ἀποσῆναι καὶ ἐαλῆς βίβλιν ἐκ ἑτὶ τοῖς τέτρωτο καὶ νόμοις, — To revolt from the Roman Empire, and they no longer professing Obedience to the imperial Laws, lived as they thought proper. And according to the above Author, those Celtic Nations,

* Z. Simus l. b. 6.
Olympiodorus
apud Phorium
cod. 80.
† Procopius Vandalicus l. i. p. 94.
q.

† Zozim. H. i. l. 6.

τὰς Βρεῖτάνους μιμησάμεναι, following the Example of the *Britons*, καὶ τὸν ἴσον σοῦς ἡλευθέρωσαν τρόπον. Ἐκάλλῃσι γὰρ τὰς Ρωμαίους ἀρχοντας, ὡς καὶ δὲ κατ' ἐξουσίαν πολίτευμα καθιστᾶσαι, freed themselves after the same Manner. For having expelled the Roman Governors, they constituted according to their own Will a kind of Republic. To this Time, the last Period of the Use of the aforesaid Imperial Law, as such, or as having Authority by Virtue of the Government of the *Cæsars*, is to be fixed. It could not however otherwise fall out, but that some Remains of the Use of the Imperial Laws, which through so constant a Custom had prevailed among us for so many past Ages, should not, at least in some Measure, subsist in that new or lately settled Government, which owed its Rise to the Free Will of the People. These Remains of the Roman Laws derive their present Force from the Consent of those who make Use of or moderate them at their Pleasure, they not at all, as before depending on the Authority of the Roman Emperors or *Cæsars*. And *Beda* § affirms the same, where he tells us that—*Ex eo tempore Romani in Britannia regnare cessarunt*, from the Time (*Rome* was taken by the *Goths*) the Romans no longer reigned in *Britain* which is also sufficiently confirmed by *Procopius*.* Others fix the Period of the Roman Government in this Matter lower, to wit, to the Year of Christ four hundred thirty four,† or four hundred thirty five, or about

§ Bed. Eccles. His. li. i. c. ii. —et in Ep. Hist. Anglic.

* Vandalic. l. i. p. 94. b.

† Chronolog. Saxon. Æthelwerdus Florilegus &c. vid. Jacob. Armachan de Britannicarum Eccles. primordiis c. 12. p. 599. Guid. Panziroll in Politia occidentis c. 81. Et Camd Brit. p. 94.

about the Middle of the Reign of *Theodosius* the younger. An antient Anglo - Saxon Chronology,† places it in the Year four hundred thirty five, *⁊ he n Goran abnecon Romebunh 7 ne fne*

⁊ npan Romane ne nicrodon on Britene.

† Chron. vet.
Angl. Sax. p.
507.

The *Goths* at this Time laid waste the City of *Rome*, after which the *Romans* never governed in *Britain*. But what is added, that that Government continued in this Manner, from the Reign of *Julius Cæsar*, is owing to the Oversight of some antient Writers, who, without well weighing the Matter, considered his landing—in *quæsitos Britannos*—as *Lucan* expresses it—with a View of subduing the *Britains*—as a Victory. And other Authors are, with respect to the Abolition of the Roman Government here, variously divided, but our Intent in this Place is not to criticise on the more minute Niceties of Time.

Now what we have already said is, in my Judgment, with regard to the Matter we are handling, all that is necessary. And it appears to me, that the Authors, who make mention of a later Time, ought rather to be understood of the Departure of the *Romans* from hence, than of the End of the Roman Government in *Britain*.

CHAPTER V.

SECT. I.

An Account of the Books in which the aforefaid imperial Law was contained; the Use of this Law, as we have before shewn, continued here during the above-mentioned Interval of the *Roman* Government, or for well nigh 360 Years in this Nation.

THE imperial Law, the Use whereof was admitted in this Part of *Britain*, after the Manner we have before described, during the Interval already mentioned of three hundred and sixty Years, or thereabouts; to wit, from the Reign of the Emperor *Claudius*, to that of *Honorius*, when the Roman Government ended here, was made up of the Remains of the (a) 12 Tables

(a) *Twelve Tables*. To compose the Differences between the Patricians and Plebeians; and in order that the City of *Rome* might be governed by standing Laws, It was agreed about the Year 300, to send a Deputation into

Tables; the antient and later *Senatus (b) Consulta* and *Plebiscita*; (c) that is, of so many of them, as were by Princes confirmed, ratified

F 4

into Greece, to inspect the Laws and Discipline of those States, and to get the best Information they could towards compyling a System for the Use of Rome.

The Delegates, who were *Spu. Posthumius Albus, Aul, Manlius Vulso*, and *Serv. Sulpitius, Camerinus*, returned at the Expiration of three Years: *Decemviri* were created in the Room of *Consuls*, and they drew up a System of Laws from the Report of the Commissioners.

These Laws (sometimes called (*Leges Decemvirales*) were divided into ten Heads, Titles, or Tables, and proposed to the People for their Approbation; and upon two more being added the Year following, they got the Name of *the Laws of the Twelve Tables*.

This System of Laws being added to the antient Customs of Rome, it became the Ground Work, or *Materia prima* of all the Roman Civil Law, and *Cicero*, b. 1. *de Oratore*, has pronounced these *twelve Tables* to be of more excellent Use and Advantage to Mankind than all the Writings of the Philosophers.

Several Writers have collected these Laws, but *Fran. Pitheu* has the Reputation of having reduced them into the best Method. *Taylor*, p. 8. *Ayliff*, p. 9.—*Bev.* p. 11. *Kennel's Antq.* p. 117.

(b) *Senatus Consulta*. The *Scita* were of three Sorts.

1. Orders, Votes, or Resolutions of the Senate in Affairs which belonged to their particular Consideration.

2. Such Acts of the Senate as tended to ratify and confirm the Acts of the People.

3. Under the new Period of the Roman Emperors, when the *Comitia* were translated, *e Campo ad Patres*, they were the only Remain of Legislation (such as it was) that the Emperor had left in the Hands of his Subjects. *Tayl.* 209. *Ayl.* 12. *Bev.* 42.

(c) *Plebiscita*. A *Plebiscetum*, was what was enacted by the People without the Concurrence of the Senators, upon the Request of one of their own Magistrates. See Note p. 41. (b) *Tayl.* p. 197. *Ayl.* p. 12. *Bev.* p. 13.



tified and retained; of the *Prætorian* (d) Edicts; of the antient Books of *Gaius*, *Scævola*, *Papinian*, *Ulpian*, *Paul*, and the Writings of such other antient Authors, out of which the *Pandects* of *Justinian* were afterwards compiled; and lastly, of the imperial Constitutions (f) promulgated before the reign

(d) *Prætorian* Edicts. The Office of Prætor was erected A. V. C. 387. and his Jurisdiction was more of Equity than Common Law Proceeding, *Tayl.* 213.

The Prætorian Edicts were certain Rules or Forms published by the Prætor at the Beginning of his Office, and signified the Method by which he bound himself to administer Justice that Year, and these Edicts were only annual, *Tayl.* 214.

These Edicts in Honour of the Magistrate were sometimes called, The *Jus Honorarium*, *Ayl.* 13.

But these Prætors, either for their own private Advantage, or in favour of some particular Persons, usually changing their Yearly Edicts, *C. Cornelius* a Tribune of the People, A. V. C. 686. proposed a Law, *ut Prætores ab Edictis perpetuis* (not perpetual, but uninterrupted and invariable, during their Magistracy) *jus dicerent*, so that it was not thence-forward lawful for the Prætors, during the whole Year of their Office, to recede from that Law, which they had declared to the Citizens they would make Use of, when they entered upon their Trust. *Tayl.* 214. *Ayl.* 18.

The Emperor *Adrian* about the Year of Christ 132, caused these Yearly Edicts of the Prætors to be epitomized by *Salvius Julianus*, and this Edict was termed the *Perpetual Edict*, because it was not subject to Change and Alteration, receiving a Validity for the Time to come, not from any Law of the Prætor, but from the Authority of the Emperor himself, *Ayl.* 17. *Bev.* p. 19.

Thus the *Jus Prætorium* made up of these Edicts, gained a Consistency, was commented upon, and was raised to that Repute, that the Study of the Civil Law, was no longer begun from the Study of the Twelve Tables, but the perpetual Edict. *Tayl.* 215.

(f) *Imperial* Constitutions. After the People had by the *Lex Regia* transferred the Empire to *Augustus*. It came to pass

reign of *Theodosius* the younger, comprising of course as well those Sanctions transcribed into the *Gregorian* and *Hermogenian* Codes, as the rest which are found in the *Theodosian*, I mean all those, which, as we have before said, were prior to the final Period of the Roman Government among us. As *Gregorius*,* a Student in the Law, inserted into his Code, the principal Laws from the Time of *Hadrian* to *Valerian*, and *Gallienus*; so *Hermogenes* enriched his, with the most material Laws enacted from the Reign of *Claudius*, *Gallienus*'s Successor, down to *Dioclesian*; consult concerning this Matter, *Cujacius* in his Preface on the Paratitles in the *Justinian* Code, from whence *Possévin** transcribed what he says about these Codes. The Books which *Papirius Justus*† composed of the Constitutions of the two Imperial Brothers, were of this kind. Both the learned in their Studies, as well as the Judges in the Courts, made Use, during the aforesaid Interval, of all the above-mentioned Works. But as the last Period of that Interval, or of the Roman Government in this Nation, must be dated one hundred Years, or thereabouts, before the Reign of *Justinian*, whose Body of Laws

* P. Possévin, Bibliothec. select. l. 12. c. 15. et vid. Guid. Panzirol. de claris. Interpret. l. 1. c. 65. & 66. ubi. pro Valerianum. male legitur Valentinianum. Et de Gregorio vid. Fr. Baldwinum in Prolegomenis.

† Cujac. obser. vat. l. 1. c. 4. Guid. Panzirol. de clar. leg. Interpret. l. 1. c. 51.

we

pass that whatever the Prince ordained, either by his Rescript, or commanded by an Edict, or decreed on the Cognizance of any Matter had the force of a Law, under the Style and Title of an *Imperial* Constitution, *Asliff* p. 15. *Bev.* p. 22. *Tayl.* 223.

* See Note p. 78.

we now make Use of ; it was for that Reason impossible there could be at that Time either among us, or any where else, any Use of the *Justinian Law* as such.

S E C T. II.

Of the *Theodosian Code*, the true Year of its Publication restored against the Opinion both of Civilians and Chronologers, who have in that Point been hitherto mistaken.

NOW the *Theodosian Code*, containing the principal Constitutions, was not very long after, or rather according to others, about the very End of that Interval, that is, of the Roman Government here, to wit, in the fifteenth Consulship of the same *Theodosius*, and the fourth of the Emperor *Valentinian* the third, in the Year of Christ 435, promulgated and ratified by a Novel or Law made for that End. And if Credit can be given to the printed Codes, * which in this point all agree, it must be right. But in my Manuscript, in which that Law is not joined with the Novells, but prefixed, as it ought to be, as a Preface to the Code itself ; as it likewise is in the *Sichardian* † Edition (it is read *Theodosio Augusto sedecies Consule*—In the sixteenth Consulship

* Novell. Theo
2. l. tit. 1.

† Basilic, 1528.

fulship of the Emperor *Theodosius*, that is, he and *Faustus* or *Festus*, being Consuls, which corresponds with the Year of Christ 438; and it is evident, that *quindecies* fifteen Times is in that Place wrong, and that the printed Codes are in this, as well as in many other Passages, corrupted; for the Series of Consuls in the Calendar then stood thus,

Christi 435. *Theodosius Aug. XV. Valentinianus IV.*

436. *Isidorus, Senator.*

437. *Ætius, II. Sigisvultius.*

438. *Theodosius Augustus, XVI.
Faustus seu Festus.*

And the Edict to *Darius Præfectus Prætorio* of the East, put forth the Year before the sixteenth Consulship of *Theodosius*, or the Year of Christ 437, to wit, *de Decurionibus et Silentariis*, is to be found in that Code; § for it is thus subscribed, *Dat. XVIII. Kal. Aprilis Constantino post consulatum Isidori et Senatoris.* Given at *Constantinople* the 18th Calends of *April*, after the Consulship of *Isidore* and *Senator* — which answers to that Year. Every one therefore must see, that the Edict of the Emperors *Theodosius*, and *Valentinian*, to *Florentinus Præfectus Prætorio* of the East, concerning the Authority of that Code, bearing Date in the fifteenth Consulship of *Theodosius*, is manifestly wrong dated

§ Cod. Theodos.
l. 6. tit. 23. l. 4

¶ Sigonius de occident. imperio. lib. 12.
 † Contius in fastis consularibus.
 * Freymon. Symphonia Juris Chronologica.
 § Baron. Tem. 5 Annal. 435. num. 23.

dated. That Edict then is evidently to be ascribed to the sixteenth Consulship, or the Year of Christ 438. Wherefore those Chronologers, such as *Sigonius*, || *Contius*, † *Freymonius*, * *Baronius*, § *Calvisius*, the Author of the Chronology annexed to the *Theodosian* Code, and some others, who place the Edition of this Code three Years before, are manifestly guilty of an unpardonable Error. This was the first Code of imperial Sanctions, put forth by supreme Authority, or under the Protection of the Emperors, for *Gregorius*, (a) *Hermogenes* and (b) *Papirius*, compiled their Codes, merely as private Persons, wherein none but the Constitutions of the Pagan Princes before their Time, were contained; but in the *Theodosian* (c) Code, the Sanctions of the Christian Princes

(a) *Gregorius* and *Hermogenes* were Heathen Civilians, who lived in the Time of the *Constantines*, and fearing lest by the new Constitutions of the Christian Princes, the Heathen Jurisprudence should be lost, they applied themselves to the Compiling their Codes, in which they united together the Laws of the Heathen Emperors, from *Adrian* down to *Dioclesian*, in order as much as possible to preserve the Antient; but all that remains of these two Codes, are some Fragments which *Cujacius* has placed at the End of the *Theodosian* Code. *Ogilvies Civ. Hist. of Naples* b. 1. p. 82. *Ayliff* 19. *Bev.* 62.

(b) This was *Papirius Jussus*, who flourished under the Reign of the Imperial Brothers *Antoninus pius* and *Marcus Antoninus*—He wrote twenty Books of Constitutions, and made a Collection of the Rescripts of the above Emperors. *Grot. de vit. Juriscon.* l. 2. c. 8. *Ayliff* 19.

(c) *Theodosian* Code. It was the younger *Theodosius*, who compiled this Code, after the model of the *Gregorian* and *Hermogenian* Codes, and it is now extant with an useful Commentary by *Gothofredus*. The eight Persons made use of

Princes alone are admitted, to wit, such as were published by *Constantine* the Great, and his Successors, before the Appearance of the *Theodosian* Code, and selected by *Theodosius* and *Valentinian* the 3d.

S E C T. III.

How the Imperial Law was in that Code altered, and at that Time appeared in a new Dress.

NOW the aforesaid Emperors, in confirming the *Theodosian* Code decreed—*Licentiam fore nulli ad forum, et quotidianas advocaciones jus principale deferre vel litis instrumenta componere nisi ex his videlicet Libris qui in nostri nominis vocabulum transierunt et sacris habentur in scriniis. Quanquam nulli retro Principum Æternitas sua detracta est; nullius latoris occidit nomen. Imo Lucis gratia munerati claritudine consultorum, Augusta nobiscum societate conjunguntur.*—That it should not be lawful for any one to bring any Matter of Moment to be decided before the Court or Place where daily Consultations were held, or to draw up the Forms of Pleadings, except

of by *Theodosius*, to assist him in the finishing of this Work, were *Antiochus*, *Maximin*, *Martyrius*, *Sperantius*, *Spolledorus*, *Theodorus*, *Epigonius*, and *Procopius*, and it contains the Constitutions of 16 Christian Emperors i. e. from about 312 to 438.

Taylor. p. 17. Ayloff Prel. 21. Bew. Hist. Civ. Law. p. 65.

cept out of these Books (to wit, out of the sixteen Books of the same *Theodosian Code*) published under our name, and deposited in the sacred Archives; though the immortal Reverence due, according to their respective Dignities, to former Princes, is not hereby derogated from, neither is any Legislator's Name hereby sunk into Oblivion, but rather, *munerati*, honoured (for it must from the Manuscript be so read, instead of what is in the printed Copies at one Time *mutuati*, another *mutati*) by the bright Station of great Lawyers, and by being joined in an august Society with us.—The same Code * also ratified the Writings of *Papinian, Paulus, Gaius, Ulpian, Modestinus*, and those of others, whose Treatises and Sentences, the foregoing Authors had mixed with their Works; such as those of *Scaevola, Sabinus, Julianus, Marcellus*, and every other Writer, of whom the above Authors made honourable mention.—*Ubi autem diversæ Sententiæ proferebantur, potius numerus vincebat autorum vel si numerus æqualis esset, ejus partis præcedebat auctoritas in qua excellentis ingenii Papinianus eminebat; qui ut singulos vincebat, cedebat duobus. Notas autem Pauli atque Ulpiani in Papiniani corpus factas, sicut dudum statutum est, præcipiebant infirmari. Ubi autem || pares eorum Sententiæ recitabantur, quorum par censebatur Auctoritas, quod sequi deberet, eligebat moderatio judicantis. Pauli quoque sententias semper valere.*—But when

* C. Theodof.
tit. de Ref. onf.
Prudent, L. unic.

|| De lictione heic
vi. Joan. Ber-
trand, de Juris
peritis l. 1. p. 12.

when different Opinions were produced, the Majority of Authors prevailed; or if the Number was equal, the Authority of that Party had the Preference, which had the Opinion of that excellent Genius *Papinian* in their Favour, which although of greater Weight than that of any single Person, was yet over-ruled by the Judgment of two. They took away the Authority which had been allowed to the Notes made by *Paul* and *Ulpian*, on the Book of *Papinian*. But when the Opinions of Persons upon a Level in Authority were equally divided, the Judge was at Liberty to determine which was to be followed. They likewise ordered that the Sentences of *Paul* should always be of weight. Then followed the Novel Constitutions of the same *Theodosius*, as well as those of the above Emperors *Martianus*, *Majorianus*, *Severus* and *Anthemius*. — Now *Theodosius* and *Valentinian*, among other Matters dispatched to the Roman Senate, passed a Decree, concerning what we have mentioned, about ten Years before the Publication of that Code, or in the Year of Christ 428, the Emperor *Theodosius* being then in his 12th (not in his 7th, as is erroneously put in the printed Copies) and *Valentinian*, in his 2d Consulship; and the foregoing Number which *Valentinus Forsterus*,* without Examination too securely relying on the printed

* Val. Forsterus
in Hist. Jur. civ.
l. 2. in Papini-
ano.

(a) There are five Books of them, and they are annexed to the *Theodosian* Code.

†Baron. Annal.
Tom. 5. an. 435.
num. 23.

§ C. Theodos.
tit. de respons.
Prudent ad L.
unic.

printed Copies, retained in the Place where he describes this Sanction, is justly corrected by *Baronius*.† The above Emperors likewise transcribed the same into their Code, as appears by the *Anianean* or *Alarician* § Interpretation, where we find — *Gregorianum et Hermogenianum ideo Legem istam præteriiſſe quia ſuis authoritatibus confirmabantur ex lege priore ſub titulo de Constitutionibus Principum et Ediſtis.*—That that Law took no Notice of the *Gregorian* and *Hermogenian* Codes, becauſe they by their Authority had been confirmed by a former Law, under the Title of the *Constitutions* and *Edicts* of Princes. It is true indeed, that is the firſt Title of this Code, but I cannot ſee any Thing in it, in the leaſt tending to corroborate thoſe two other Codes, or any principal *Constitutions* of former Times. Now from what has been already briefly ſaid, it is ſufficiently plain, in what Books the Imperial Law, at that Time in Force, was contained; whence one may alſo partly judge of the Law in Uſe immediately before among us.

S E C T

S E C T I V.

Of the Use, to the Time of *Justinian*, of the Imperial Law renewed by the Barbarians in the West, in *Italy*, *Spain* and *Gaul*, after they had laid waste the Roman Empire ; that is to say, of the Law chiefly contained in the *Theodosian* Code, and in the *Anianean* or *Alarician* Breviary.

NOW the Roman Empire in the West, (if we except the narrow Boundaries of the Exarchate (a) of *Ravenna*) being some
Time

(a) *Exarchate of Ravenna*. The Provinces of *Italy* had ever since the Time of *Constantine* the Great, been governed by *Consulares*, *Correctores*, and *Præfides* ; no Alteration in the Government having been made either by the Emperors, who succeeded *Constantine*, or by the Kings of the *Goths* ; But *Longinus*, in the beginning of the Reign of the Emperor *Justinian*, being sent to succeed *Narſes*, with an absolute Power and Authority suppressed those Magistrates, and in their Room placed in each City of note, a Governor, whom he distinguished with the Title of Duke : For himself he took the Title of *Exarch*, which by the Greeks was given to those who presided over a *Diocese*, and consequently over the many Provinces of which the *Diocese* was composed. This Title was adopted by the Successors of *Longinus*, who residing, as he had done, at *Ravenna*, were thence called the *Exarchs* of *Ravenna*. They governed all *Italy*, naming and removing the Dukes at their Pleasure ; and to them the People had Recourse in all Matters of
Moment

Time after, by the Irruptions of the *Goths*, *Vandals*, and other Northern Nations, torn to Pieces, and dispersed into different Kingdoms, in a Manner dwindled into nothing ; on which Account the Use of the Imperial Law we have treated of more antient than the *Justinian*, must of course, as such, or as depending on the Authority of the Emperors, that Empire ceasing here, no longer subsist among us. It was however, and that too, under the Name of those who first gave Sanction to it, in such a Manner retained and allowed of by the aforesaid conquering Nations, as to be about that Time, by King *Theodoric* the Ostrogoth, and by some of his Successors, made Use of at *Rome*, and through *Italy*, in the public Administration of Affairs ; though it was, as is very evident from the miscellaneous Works of *Cassiodorus*, interspersed with the new Edicts of those Kings. And *Alaric* the second King of the *Wisigoths* in *Spain* and of the more southern *Gaul*, selected and
ex-

Moment. This Magistrate maintained the Power and Authority of the Emperors of the East in *Italy* for the Space of one hundred and eighty three Years, that is from the Year seven hundred and eight, when *Longinus* was sent into *Italy*, to the Year seven hundred and fifty one, when *Eutychius*, the last Exarch, was driven out, and *Ravenna* taken by *Astulfus* King of the *Lombards* ; from this Time it became a Dukedom, and was no otherways treated than the other lesser Dukedoms of which the Kingdom of the *Longobards* was made up.

Univ. Hist. V. 7. Part 2. Fol. Edit. p. 677. *Ogil. Hist. Nap.* V. 1. p. 259.

explained, by the Assistance of (b) *Anianus*, both out of the *Theodosian* Code, and several * other Books, different Kinds of Laws, and decreed, It should not be lawful for any one to offer any Thing by Way of Argument, concerning the Laws, or Rights, than what that Book so compiled contained. That Book, which may be called either the *Anianean* or *Alarician* Abridgment, is the very *Theodosian* Code, though not quite so complete as that we now make Use of, with the other Novels of the Emperors *Theodosius*, *Valentinian*, *Martian*, *Majorian*, *Severus*, and *Anthemius*, annexed unto it, as well as some Things taken out of the *Gregorian* and *Hermogenian* Codes, together with the *Anianean* Interpretations, such as they are, though sometimes, (as the learned often remark) too remote from the Sense of the Imperial Law: It moreover contains the Fragments of *Gaius*, *Paul*, *Ulpian*, *Papinian*, or (as he is there called) *Papian*, though sometimes altered * as the Transcriber thought fit, and the small Piece of *Volutius Metianus*, as I think, explaining

* Præfat. ad. Cod. Theodof. Sigen. de occidental Imperio. l. 16.

* Alciat. Parerg. l. 2. c. 26.

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the

(b) *Assistance of Anianus*.—*Anian* Chancellor to *Alaric*, for many Ages, had the Honour of being thought the Compiler of this Breviary of the *Theodosian* Code; but *Jacob Gothofredus*, in his learned *Prolegomena* prefixed to the above Code, is of Opinion, *Anian* had no Hand in composing it; but that the Compilation is owing to *Gojaricus*, and his Collegues, and that it was only published and subscribed by *Anian*, by Order of *Alaric* at *Ayre* in *Gascony*, in the Council of both the Orders.

Vid. *Alarici Commoritorium* *Timotheo*. *Gothofred. Proleg.* c. 5. p. 192. *Ogil. Civ. Hist. Nap.* p. 120.

the Terms and Characters made Use of in pecuniary Affairs. *Anianus* † himself says — *Ex his omnibus Jurisconsultoribus ex Gregoriano, Hermogeniano, Caio, Papiniano, et Paulo quæ necessaria Causis præsentium temporum videbantur elegimus.* — We have selected out of the Gregerian and Hermogenian Codes, and the Lawyers *Caius*, *Papinian*, or *Papian*, and *Paul*, what seemed necessary towards deciding the Causes of the present Times. Yet some are of Opinion, ‡ that the first eight Books only of the *Theodosian* Code were contained in this *Alaricion* Breviary. Now the other Parts annexed, bear the Name of *Theodosian*, as well as the very Code of that Emperor; for which Reason, *Ivo Carnotensis*,* and *Gratian*, § expressly call some of the Sentences of *Paul*, *Theodosian* Laws; and for the same Reason the Sentences and Interpretation of *Paul* are in plain Terms also antiently called ‡ the *Anianean* Law." See, concerning this Matter more in *Joannes Savaro* on *Sidonius* (c) *Apollinaris*,* where he likewise accounts for what is said of *Seronatus* (d) (who flourished about the Reign of

† *Anian.* Glos.
ad C. d. Theodos.
tit. de respons.
prudent L. unic.

‡ vi. Guid. Pannorm.
de clar. leg.
Inter. l. 2. c. 3.

* *Ivon Carnoten.*
Pannorm l. 4. c.
127. c. 128.
§ *Gratian.* Caus.
2. quæstio. 6. c.
22. propter afflu-
entiam 24. 25.
‡ In Synod. Pa-
ris. sub Ludovico
Pio. apud Ivonem
Decret. part 14.
c. 21. *Gratian.*
Caus. 24. quæst.
3. c. 1.
■ *Jean. Savaro.*
l. 2. Ep. 1.

(c) *Sidonius Apollinaris.* He was Bishop of Clermont in France, and attained to that Reputation of Learning as to be esteemed the greatest Man of his Time; he died in the Year 482.

(d) *Seronatus.* This Man lived in the Time of *Evaricus*, King of the *Wisigoths*, and was Præfect of the *Gallia* under *Anthemius*, the then Roman Emperor; but by favouring the Party of the *Gots*, and betraying his own Prince, set himself in Opposition to the Romans. *Ogil. Hist. Nap.* p. 118.

of the Emperor *Anthemius*, or a little before *Anianus* — *leges Theodosianus calcans Theodoricianasque proponens, veteres culpas, nova tributa perquirat*—Contemning the *Theodosian* Laws, and proposing the *Theodorician*, (e) raking up old Offences, and exacting new (a) Tributes; for the Laws before the said *Anianus* or *Alaric's* Time, were thus remarkably distinguished; Consult also as to this matter concerning the *Theodorician* Laws, and the Reason of their being called so, *Cujacius* † in his Epistle to *Emaricus Ranconetus*, *Baronius*,* and *Innocentius Cyronius*. § And it is likewise to be observed, that *Ataulphus* the Goth, || long before this *Alaricus*, or about the Year four hundred and twelve, had resolved, so to have changed whatever was Roman into the Gothic Name and Customs, as totally to have obliterated the Roman Name. But he afterwards for very weighty Reasons, being unable to bring about a tho-

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rough

(e) *Theodorician*. These Laws were called *Theodorician*, by way of Allusion, or *Paranomasia*, in Opposition to the *Theodosian*; that as the Romans valued themselves on the *Theodosian*, so the Goths having their own Laws, though different in Sense, yet the same in Sound, would have them called *Theodorician*; and the true Name of *Alaric*, who caused this Body of Laws to be compiled, having been *Theodoric*, the *Paranomasia* was less insipid. *Ogil. Hist. Nap.* p. 119.

(a) *Tributes*. These are the Complaints the Provincials made against *Seronatus*; and his Villainy did not go long unpunished, he being dragged along the Streets of *Rome* and beheaded. *Ogil. Hist. Nap.* p. 118.

† Cujac, Epist. præfix. Cod. Theodosiano.

* Baron. Ann. tom. 6. An. 468. N^o 12.

§ Innocen. Cyron observat. Juris Canon. l. 5. c. 1.

|| Orosius l. 7. c. 43. et vid. Goldast. Imperator. Constitut. tom 3. p. 386.

rough Change of the aforesaid Laws, laid aside this Design, and aimed at being considered as the Author of the Restitution of the Roman Laws. Now that Body, which may be called either the *Alarician* or *Theodosian* Code, though more properly by the Name of the former, was published in the Year of Christ 506; and it cannot be doubted, but that the Laws contained in that Body, and in the other Writings just mentioned, were in that Age for the most Part retained by the *Franks*. For *Agathias* *

* *Agath.*, Hist. Justiniani, l. 1.

(who lived in the Reign of *Justinian* speaking not only of his own, but of former Times, and relating the Customs of the *Franks*, says, καὶ πολιτεία ὡς τὰ πολλὰ χρῶνται Ῥωμαϊκῇ καὶ νόμοις τοῖς αὐτοῖς καὶ τὰ ἄλλα ὁμοίως ἀμφὶ τε τὰ σύμβολα καὶ γάμους καὶ τὴν θεοῦ δεσπείαν νομίζουσιν — And they, for the most Part, make Use of the Roman Polity and Laws, and observe also the same method in their Contracts, Marriages, and Divine Worship; which as well as what we have before mentioned, relating to Times, subsequent to the Reign of *Theodosius* the younger, must be understood of the *Theodosian* Code, and of the other *Anianean* or *Alarician* Books. Thus stood Matters with regard to the Imperial Law in the West, down to the Reign of *Justinian*, after the great Declension of the Roman Empire there.

S E C T. V.

The constant Use of the *Justinian* Law as such in the East. — No Use for many Ages after his Time made of it in the West, in Matters of publick Government. — The *Theodosian* Body with its Adjuncts was under the Name of Roman or Imperial, variously received, as well before as after the Reign of *Justinian*, down to the Middle of the twelfth Century, or thereabouts, in the Management of the publick Affairs of some western Nations.

BUT *Justinian*, about ninety Years after the first Publication of the *Theodosian* Code, or twenty four Years from the *Alarician* Interpretation, or the Year of Christ, 530, began to publish (*a*) in the

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East

(a) The Body of the Civil Law is composed of the *Code*, *Digest*, *Institute*, and *Novells*.

The first *Code* which was published by *Justinian*, came out on the VII Id. April, 529; but the Emperor being sensible there were many Defects in it, and that since the Publication thereof, he had been obliged to make

East, some Parts of the Body of his Laws, which was complicated before the Year 565, in which he (b) died. Nor did the Authority, such as it had been heretofore, of

make several Ordinances: He on the 16 Kal Decem. 534, published another Code, calling it *Codex repetita praelectioni*, i. e. the Code revised and augmented; and suppressed the other Code, which is not now extant.

The *Code* comprises the Laws of fifty-four Emperors from *Aurion* to *Justinian*, it is divided into twelve Books, every Book into separate Titles, each Title into Laws, and each Law contains several Parts.

The *Digests* were next in Order of Composition, though not of Publication, they came out the 16 Decem. 533, and are divided into fifty Books, and those Books into Titles, &c. much in the same manner as the Code; they are called *Digests*, because the Opinions of the ancient Civilians, which lay dispersed in two thousand Volumes were digested into Order, and disposed of as much as was possible under each Title, according to the Method and Series of the perpetual Edict; they got the Greek Name, *Pandectio*, as comprizing all the anti-ent Jurisprudence.

Whilst the *Digest* was composing, the Emperor laid his Commands upon *Tribonian*, *Theophilus*, and *Dorotheus*, to make an Abridgment of the first Principles of the Law, which was published the 21 Nov. 533, near a Month before the *Digest*, under the Title of *Instituta*: The *Institutes* are divided into four Books, each Book into several Titles, and every Title into several Parts.

The *Novells* or *Authenticks* make the fourth and last Part of the Civil Law; they are called *Novells* as being new Constitutions, mostly of *Justinians*, promulgated at several Times, and upon different Occasions, after the Publication of *Justinian's* second Code. *Authenticks*, from their being authentically translated from the Greek into the Latin Tongue, and they were not collected and joined together in one Volume till after the decease of *Justinian*.

See *Taylor*, *Ayliff*, *Ogilby's Hist. Naples*, *Bever*.

(b) About the eighty second Year of his Age.

of the *Theodosian*, *Gregorian*, *Hermogenian*, or of the other Codes of the Law; nor the *Prærogative* antiently allowed to *Papinian*, any longer subsist in the East. Many other Matters were altered, re-established, abrogated, introduced; *Justinian* gave a new Turn to Affairs, military and forensic, changing some Laws, and bringing in others, as * *Procopius* writes, * *Ὅπως ἀπαντα*

* *Procop. Hist. Arcan. p. 49.*

rescripta τε καὶ ἀντὶ ἐπὶ νόμους ἐν ———i. e. that all Things might be looked upon as new, and called after his Name. Concerning which Matter, see also more very well worth Notice to this Purpose, as well in his secret History, as in the Notes of *Nicholaus Alemannus*: That Body then very different from the antient or *Theodosian* Code, was made Use of, both in the eastern Parts of the Empire, and in the Exarchate of *Ravenna*, till this last was, in the Year of Christ 752, by King *Austulphus* abolished;† and again indeed in the East, down to the Time that *Constantinople* was, about the Year of Christ 1453, taken by the Turks; at which Time it is said, § that the Patriarch *Maximus* did, by Order of *Mahomet*, who took that Imperial City, among other

† *Sigon. de regno Italiz l. 3.*

§ *Hist. Polit. turcogræc. l. 1. No. 56.*

Books, translate into *Arabic*— καὶ τὰς Κώδικας τὰς Βασιλικὰς ——— the Imperial Codes (by which must be meant, either the Imperial or *Justinian* Body of Laws, or the sixty Books of the *Basilics* compiled, it is not improbable, from it) for the future Use of the *Mahometan* Empire. And it is evident, both

both from the *Basilics* themselves, and from the *Synopsis*, which *Harmenopulus*, *Attaliatas*, *Nomocano* of *Photium*, *Balsamon*, *Zonaras*, *Psellus* made of them, as well as from several other Greek Authors, easily to be met with, both on the Imperial Law, and on the Pontifical, intermixed with it; that there was in the East an uninterrupted Use of the antient Imperial Law. But in the West, the Roman Empire, considered as such, in a manner dwindled away into nothing, upwards of fifty Years before the Reign of *Justinian*, as *Procopius* (a), also, and *Agathias*, co-temporary with *Justinian*, where they treat of his Reign, sufficiently evince. And what *Corippus Africanus* says, where he now and then styles *Justin* the younger, *Justinian's* Successor, Lord of the World, and of the Universe, must be looked upon only as a gross Piece of Flattery; many more such Titles in that Age are extremely ridiculous, unless they are intended to assert the antient Rights of the Emperors, and not thereby to represent in any Sort, the then Power and Right of governing in the West: for it is manifest from all History, that such Power which long before had been reduced within the narrowest Limits, at last, after a Century or

(a) *Procopius*. He was Secretary to the famous General *Belisarius* in all his Wars, and was afterwards made Senator and Prefect of *Constantinople*.

or two, or thereabouts, entirely ceased; wherefore the Imperial Law, after the aforesaid Irruptions of the Barbarians, before the Reign of *Justinian*, as well as in the Ages subsequent to him, must be considered in a two-fold Light; either as it was made Use of in the public Government, or as read or neglected by the learned in the Schools, or as apply'd by Writers. And in handling each of these Points, the *Theodosian* Code, with what is annexed unto it, or the *Alarician* Body of Law, that is the Law, preceding the *Justinian* Code, or the old Imperial Law; and the *Justinian* Body, or the later Imperial Law; are to be considered a part. The more antient Roman Law, in force before the Reign of *Justinian*, bore Sway before the Emperor's Time, and for many Years after in the public Government of the *Ostrogoths* in *Italy*, and of the *Visigoths* in *Spain* and *Gaul*, and some other neighbouring Nations, though it was considerably clogged with the *Theodorician*, *Anianean* or *Alarician*, and such other like new Edicts, and superinduced Interpretations; neither was it then any other ways admitted, than as it received Sanction from the new Authority of the Princes, who allowed of it. What we have thus related, no Ways concerns the *Justinian* Body, or any Part of it; but relates only to the *Theodosian* Code above-mentioned, and to the other Laws annexed unto it, which were publickly made Use of. And that *Greek*
Epigram

Epigram, prefixed to the *Florentine* Edition, telling us, That the People of *Asia*, *Africa*, *Europe*, as much as to say, all Mankind, every Nation, paid Obedience to *Justinian* and his Digests, is a most gross Hyperbole, it being evident that the *Theodosian* and other Laws, as we have said, which had obtained the Name of Roman, prevailed in the West. Neither did the *Franks* admit of any other Roman Laws; it being of these, as we have before observed, that *Agathias* speaks, where he tells us, that they *ὡς τὰ πολλὰ* for the most part, conformed themselves to the Roman Polity and Laws; for he could not, on Account of the Mixture in their Customs, and *Justinian's* having, as we have above taken Notice of, therein introduced very remarkable Alterations, mean this in an absolute Sense. Nor was the Roman Law, which Pope *Leo* the fourth, about the Year of our Lord 850, in his Epistle to the Emperor *Lotharius* the first, informs us flourished at that Time at *Rome*, and through *Italy*—*Absque universis procellis*—without any Opposition, any other than the *Theodosian*: Consult concerning this Matter, *Gratian** and *Ivo*, || and we meet, both in the antient Formularies of *Marculphus*, and in some others, as well as in the miscellaneous Works of *Cassiodorus*, who wrote before their Time, with frequent Footsteps of this Law. Neither was the Law indeed at that Time with

* *Gratian*, Dist.
10. c. 9. & 13.
|| *Ivo* part 4. c.
179. and *Pannor.*
lib. 2. tit. de le-
gibus. c. 152.

with greater Propriety called *Roman*, than those provincial Tongues, the *Spanish* and *French*, which by Corruption sprang from the antient *Roman* Language, were usually called *Roman* and *Romance*. These Tongues did not deviate more from the *Latin*, than the above Laws, however then called *Roman*, as admitted into, and adapted to Practice, differed from the original Sense of the aforesaid *Theodosian* Body. That antient Law moreover, was, even in the Empire itself, translated as it was into the West, so enlarged and altered by new Capitularies of the *Caroline* Race, that it visibly put on another Face, and that too, as is evident, exceedingly different from the old Body of Laws. The same may be likewise said of the Use of the aforesaid antient *Roman* Law throughout *Spain* and *Gaul*, which no one, acquainted with the Laws of the *Longobards*, *Wisigoths*, and with those of other Nations, collected together in the Code of antient Laws, can be a Stranger to. King *Cindaswinthus*, about the Year of Christ 650, prohibited by a most express Edict, * the Use of the *Roman* Law, even among the *Wisigoths*. And that old *Roman* Law was in the Ages between the End of the *Roman* Empire in *Britain*, or about the middle of the fifth Century, in the Year of our Lord 450, and the middle of the twelfth Century, or thereabouts, that is, in the Year of Christ 1150, in a very

* *Leg. Wisigoth*
l. 2 c. 9. Et o.
serva. *Leg. Joan*
Pag. 8. apud.
Ivener. in D-
c. 1. te 7 c.
98. ci at. apite
proximo f. 1.

very different manner retained and made Use of in the Government of some Parts of the West, when the *Justinian* Body, which had been as it were for a long Time buried in Oblivion, revived again, as shall be presently shewn, in the West. That most learned Work lately published by ‡ *M. Antonius Dominicus*, I. C. relating to the Prerogative of *Allodial* Lands, in the Provinces of *Narbon* and *Aquitain*, and *Innocentius Cironius's* * Observations on the Canon Law, wherein he mentions a Treatise of *Joannes Costa*, Professor of *Thouloze*, of the Origin of the Law in *France*, which was then soon to appear upon this Subject, are preferably to all other Writings, as far as the *Galls* are therein concerned, to be consulted. And here it is first to be observed, that when *Isidorus (a) Hispalensis* † proposed making an exact Treatise of the Laws, and to enumerate their respective Authors, he makes mention of the *Gregorian*, *Hermegenian*, and lastly of the *Theodosian* Code, but takes no Notice of the *Justinian*, on Account of its not being then used in the West. That Author flourished about the Year of Christ 630, or about seventy Years after *Justinian*. Every one moreover had Liberty, even in the Roman Empire, to declare by what Law he would be governed, whether by the *Roman* (which must always be

‡ *M. Anton. Dominicus* J. C. de Prærog. Allod. Parisiis 1645. Vid. sis Guill. Ranchinum var. lect. l. 2, c. 3.
* In. Cyron. l. 5.

† 166. Hispalensis originum l. 5.

(a) *Isidorus Hispalensis*. He was A. B. of *Seville*.

be understood of the *Theodorian* Body of Law, together with the other Laws annexed unto it ; it being compleated at the Time when the Emperors, who gave Sanction unto it, governed in the West, which cannot at all be said of the *Justinian* Body, inasmuch as it received its Power from him) or the *Gothic* or *Longobardic*, or any other then in Force. And this we are well assured of from the Law * of the Emperor *Lotharius* the first, relating to that Matter ; which Law I am nevertheless of Opinion ought thus to be understood, that the aforesaid Liberty of conforming to the Rule of this or that Law, was only indulged to Princes or Heads of whole Cities, Villages, Territories, and to a Number of Inhabitants forming themselves into a civil Community, who had freely made such a Declaration, but not to single Persons in a distributive Sense ; for it seems no way reasonable to understand that Place of such. An Instance of the Effect of such a Declaration of this Kind may be seen in *Carolus de Tocco*,† of a *Roman* and a *Lombard*, implaining each other in Court, thus distinguished by their respective Profession of different Laws—an illustrious Example likewise of this Kind of Protestation, occurs in the Professions made by *Boniface*, Duke of *Tuscany*, and the Countess *Maud* his Daughter, to wit, He declared for the *Longobardic*, she for the *Salic* Law ; which *Carolus Sigonius* * remarks out of their Tables, fe-

* Leg. Longobar.
li. 2. tit. 57.
Sigon. de regno
Italiz lib. 5.
Et videtis Hinc-
mar Rhem. de
coercendo captu.
c. 12. p. 234.
Edit. Sermond.
Ivo Decret. part
3 cap. 38.
Goldast. Constit.
tut. Imperial.
tom. 1. p. 126.

† Carol. de Tocco
Gloss. in Leg.
Longobard. l. 2.
tit. 57.

* Car. Sigonius
de regno Italiz
lib. 8. Anno 1007

veral

• Inno. Cyron
observat. Juris
Canon lib. 5. c.
5.

† Edict. Pistense
An Chr 864. c.
13. 16. 20. 23.
28. 31.

* Capitul. Carol
et Ludovic. l. 6.
c. 281. et 307.
&c.

veral whereof are preserved in the Church of *Modena*. But that she afterwards chose the *Longobardic*, is also concluded from the Charter of her Donation, by which in the Year of our Lord 1096, she founded the Abby of Mount Saint *Peter* in the Diocese of *Mentz*, whence some * would prove *Sigonius* to have been mistaken, but I think without Grounds, she having made the one in her younger Years, the other when she was very old; and the Difference of the Places, with regard to this Matter, must also be considered: The (a) *Pistenhan*† Edict likewise of *Charles* the bald King of the *Franks*, in which there is frequent Mention, suitable to the Intent of that *Lotharian* Law, of the Countries and Lands in which Judgments are determined according to the *Roman* Law, and of those who conformed to that Law, plainly makes to that Purpose. But the *Roman* Law, mentioned as well in those Capitularies, as in the antient Writings of the Emperors, *Carolus* and *Ludovicus Pius*, and elsewhere in other Authors of the same Kind in that Age, must always be understood of the *Theodosian* Body, and of the other Laws annexed unto it, not at all of the *Justinian*. Moreover some Things are expressly alledged * in the Capitularies of *Carolus* and *Ludovicus*, out of the

(a) *Pistenhan*, called so from *Pistæ*, an antient Castle in the Diocese of *Rouen*. *Doujat.* p. 318.

the *Theodosian* Body, as Laws; and in the Additions † of *Ludovicus*, relating to the Punishment of those who change the Nature of Copulation, where, *Lex Romana omnium humanarum mater*, the Roman Law is called The Mother of all Laws; this cannot be understood of any other, than of the *Theodosian* Body. As for Example, it is there said, That the Perpetrators of such a Crime are, according to that Law, to be burnt; whereas by the *Justinian* Law, to wit, that of *Constantine* and *Constans*, received into his Code, § though not into the *Theodosian*, such are to die by the Sword. But the Rescript of the Emperors *Theodosius*, *Valentinian*, and *Arcadius*, to *Orentius* Vicar of the City of *Rome*, * found in the *Theodosian* Code, prescribes Burning alive, which being erroneously printed, is thus to be corrected from the Manuscript—*Omnes quibus flagitii usus est, virili corpore muliebriter constitutos, alieni Sexus damnare Patientiam (nihil enim discretum videntur habere cum feminis) hujusmodi scelus, spectante populo, flammis vindicibus expiabunt*—Whence for the most Part, as *Civilians* † remark, the Custom of condemning to the Flames such flagitious Criminals, is to this Day retained among some remote Nations, in which that Roman Law was in those Ages made Use of. And as that Punishment was altered by the *Justinian* Law, that is by the *Constantinian* Sanction, brought again by *Justinian* into Practice; so in-

† Addit. Ludovici, 4. c. 102.

§ C. Just. li. 9. tit. 9. ad legem Julianam de Adulteris l. 31.

* C. Theodos. li. 9. tit. 7. seu. ad legem Julianam de Adulteris l. 6.

† Damhouderius in praxi Crim. c. 98. f. 12. Julius Clarus Sentent. lib. 5. S. Sodomia num. 4.

deed the whole Body of the *Theodosian* Code, as far as it had Authority, or was made Use of in Court, and as such, was in a Manner entirely abolished by the *Justinian* Law, (to wit, as much as that could be thereby effected) concerning the Confirmation of the new Code. But his Empire and Power was at that Time almost limited to the East. That *Theodosian* Body however was visibly now no longer, properly speaking, Imperial, or kept up by the Authority of the Emperors, but was by the above-mentioned Western Kings and Nations, according to their respective Pleasures, variously received. And the *Justinian* Body was then, as well as at present, in many Things very contrary to it.

S E C T

S E C T. VI.

A Survey of the Use which Authors and the learned, during that Interval, made of the *Theodosian* Code, and what was annexed unto it. Likewise concerning that most famous Law of *Constantine*, contained in that Code, or generally published with it; by Virtue of which a prodigious and monstrous Jurisdiction was formerly attributed to Bishops, or to the Hieratical Order, though in reality, that Law was never a Part of the aforesaid Code, at the End of which it is found; but the same, though long before abrogated, was added unto it by some Forgerers.

NOW concerning the Writers and learned during the Interval we are at present treating of, among whom those who have patched up the pontifical Law, partly out of the Decrees of Synods, partly from Collections, made up of Scraps picked up here and there, are, in my Opinion,

to be reckoned : it cannot at all be doubted, but that they made frequent Use, as we have already mentioned, of the *Theodosian* Code, it being of so much Weight in Matters of public Government. And it is evident to me, that a certain anonymous Author, in all Appearance a *German*, in that Part of his Epistle to *Boniface*, Archbishop of *Mentz*, about the Year of Christ 750, where he makes mention of the Study of the Roman Laws, speaks of this Code, but whether of any other I cannot say. — *Neque enim parva temporum * intervalla in hoc studio protelandanda sunt, ei duntaxat qui solerti sagacitate legendi succensus legum Romanorum, jura medullitus rimabitur et cuncta juris consultorum decreta ex intimis præcordiis scrutabitur.*—Neither, says he, are the smallest Intervals of Time to be neglected in this Study by a Person, who in earnest thoroughly desirous of applying with unwearied Diligence a good Genius, will closely examine to the Bottom the Grounds of the Roman Laws, and minutely pry into all the Decrees of the Lawyers.—All which this anonymous Author, equally skilled in Poesy and Mathematics as the Law, meant of himself. But in this Place we judge it sufficient to animadvert only upon one of the most remarkable Instances of that Use in those Ages. Now there is met with in some of the Editions of the *Theodosian* Code, to wit, in the *Cujacian*, and in those which copy after it, at the
End

* Apud Bonifac.
Meguntini in E
pist. 68.

End of the sixteenth Book, the Title *de Judicio Episcopali*, concerning Episcopal Jurisdiction, which in some Books is said, *deerrasse Corpore Theodosiano*, not to be found in the *Theodosian* Body. There are three imperial Sanctions under that Title. The first is that most celebrated one, by which that immense and monstrous Power and Jurisdiction is, by *Constantine* the Great, in his Rescript to *Ablavius* the *Præfectus Prætorio*, granted to Bishops in the following Words,—*Ut pro sanctis semper et venerabilibus habeatur quicquid Episcoporum fuerit Sententia terminatum.*—That whatever was determined by the Judgment of Bishops, should always be held as sacred and venerable; and that, in all Kind of Causes,—*quæ vel Prætorio vel civili Jure tractantur*——whether they were handled according to the *Prætorial* or *Civil* Law.—And that very same Sanction is admitted into the *Capitularies* of the Emperors *Carolus* and *Ludovicus*,[†] collected † by the Abbot (a) *Ansegisus*, as from the 12th Chapter of the *XVI* Book of the Emperor *Theodosius*, according to the *Lindebrogian* Edition, as—*Lex cunctis perpetua tenenda* —— a Law to be for ever observed by all. But it ought now to be remarked, that the sixteenth Book has eleven Titles, then called Chapters; wherefore this, — *de judicio Episcopali*—concern-

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(a) *Ansegisus*. He was Abbot of *Lobies*, and dyed in 834. *Dupin's Ecc. Hist.*

† Collect. Capituli & Carol. et Ludovic. ab. Ansegisus, l. 6. c. 231.

§ Gratian. *Caus.*
11. quæst. 1. c.
37.

|| Concil. Gallie.
Simond. tom. 3.
p. 136.
Concil. General
tom. 3. pt. 2. p.
394. edit. 1918.

† Ivo. *Decret.*
part. 16. c. 312.
Pannorm. l. 5.
c. 23.

ing Episcopal Jurisdiction—is to be looked upon as the twelfth of the last Title. And it is indeed cited in the *Pythæan* (b) Edition, as well as by *Gratian*, § out of the Capitularies, from the eleventh Chapter or Title of the sixteenth Book : and thus in reality it is to be reckoned as a Part of the eleventh Title, or that *de Religione*—concerning Religion. Now these three Sanctions under the Title—*de Episcopis, Ecclesiis et Clericis*—concerning Bishops, Churches and Clerks, which is the second of the sixteenth Book, do not in my Manuscript immediately follow each other, but are variously inserted. There is added indeed that Sanction concerning the Jurisdiction of Bishops, decreed by the third Council of *Valens*, || held in the Year of Christ 855, in the Reign of the Emperor *Lotharius* the first, and *Charles* the Bald, in the Name it is true of *Constantine*, and though not expressly as from the *Theodosian* Code, yet by some antient Copies of it, it is plain, from what *Jacobus* (c) *Sirmondus* has set forth in the Preface of his Appendix to the *Theodosian* Code, that it was, together with some others, as it were, an Appendix to it. And both *Ivo* † and

(b) *Pythæan*—called so from *Peter Pitheu*, a learned Frenchman.

(c) *Sirmondus* a Jesuit and Confessor of *Lewis* the 13th of France. He was a Person of great Learning, and dyed in 1651, being 93 Years of Age,

and *Gratian*,* as well as *Anselmus (d) Lucensis* took, as is observed in the Notes of the *Gregorian* Edition on *Gratians Decretum*, this *Constantinean* Sanction from thence. And it is evident indeed, whether they transcribed it out of the *Caroline Capitularies*, or from the very Code of *Theodosius*, or out of its Appendix, that they looked upon it, as *Theodosian*, and Part of the *Theodosian Law*; for it was never admitted into the *Justinian Body*. *Baronius* † places this Sanction in the Year 314, or in the ninth of *Constantine*; and he thinks that *Eusebius*, § and *Zozomen*, || have pretty truly and briefly given us the Sense of that Sanction. And the Use of this Code was doubtless, on Account of this Sanction's being contained in it, extremely agreeable, and highly acceptable to the Hieratical Order; for by thus attributing such an immense Power to the Bishops, it thereby, beyond all Dispute, became very pleasing to them. And it may hence be justly gathered, that the Use of the Copies of that Code, whether genuine or corrupted, was not uncommon among the learned and Writers, during that Interval. But concerning the Sanction itself mentioned here, (which we crave Leave by the by to make some Remarks on) I am satisfied, that it was never at all in reality inserted by *Theodosius* in his Code; for it is

* *Gratian. Caus. 11. quæst. 1. c. 35.*

† *Baron. Ann. tom. 3. ann. 314. num. 38. & 39.*

§ *Euseb. de vita Constantini li. 4. c. 27.*
|| *Zozomen. l. 1. c. 9.*

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(d) *Anselmus Lucensis*. Of *Luca in Tuscany*. He flourished about the Year 1103.

manifest that it was long before the Beginning of his Reign abrogated by *Valens Gratian*, and *Valentinian*, in the Year of our Lord 376, the aforesaid Emperors allowing Bishops Power only in such Matters as—ad † *Religionis observantiam pertine-*

† C. Theodos.
tit. de Episcopis
l. 23.

bant—related to the Observance of Religion.

The same is also confirmed by *Honorius* and *Arcadius*, who wisely prescribing Bounds to

* Cod. eod. 16.
tit. de Religione
l. 1.

the Episcopal Power, decreed that—* *quoties de Religione ageretur ut Episcopi agerent, cæteras vero Causas quæ ad ordinarios cognitores vel ad usum publici Juris pertinent, legibus oportere audiri*—as often as

any Question arose concerning Religion, Bishops should be sole Judges, but that all other Causes which belong to the ordinary Magistrates, or relate to the Practice of the established Law, ought to be determined by those Laws—and these Matters are contained in the *Theodosian* Body of Laws, as well as fully explained by the Emperor *Val-*

† Valentin. Nov.
41. 12.

entinian † the third. At that Time neither the Bishops, nor their Consistories, could without the Consent of the contending lay Parties, take Cognizance of their Causes. *Quoniam constat Episcopos et Presbyteros forum legibus non habere nec de aliis Causis secundum Arcadii et Honorii Divalia constituta, quæ Theodosianum Corpus ostendit, præter Religionem posse cognoscere.*—Be-

cause, says that Emperor, it is evident, that Bishops and Priests have no Court to determine the Laws in, neither can they, according

cording to the Imperial Constitutions of *Arcadius* and *Honorius*, as is manifest from the *Theodosian* Body, judge of any other Matters, than those relating to Religion. Thus the aforesaid Emperor *Valentinian*. Neither indeed do I think that the above Sanction, as an extravagant, obtained a Place at the End of the *Theodosian* Code, or was, under the Title *de Episcopis*, by any other Means foisted into my Manuscript, than by the Frauds and Deceits, constantly, under various Pretences, made Use of by the Hieratical Order, who endeavoured to strip, right or wrong, according to the Custom of those Ages, not to mention others, sovereign Princes and Republics of their Authority and legal Power ; by this Means, under the Cloak of Religion, its constant Pretext, most strenuously serving their own Ends and Ambition. For in the *Theodosian* Code, it could have no Place, unless you allow, what is no Way probable, that the Compilers of that Code, in a Matter of such high Importance, too carelessly stuffed it with Sanctions, evidently opposite to one another. And the *Justinian* Law, into which this Sanction was never at all received, is not only every Way against it, but is manifestly abrogated by it. Nevertheless, even after the *Justinian* Body of Laws had been received throughout the West, chiefly, as we shall presently shew, by the Hieratical Order, that very same Sanction was set forth, both as a *Theodosian*
and

§ Antiq. Collect.
3. lib. 2. tit. 1.
Et Extr. tit. de
Judiciis, c. novit.
13.

[Gratian. Gloss.
C. 11. quest. 1.
c. qui conque35.

and *Caroline* one, and as if it had been then in Force, as may be seen in the Epistolary Constitutions of *Innocent* § the third, about the Year 1200, to the Bishops of *France*, the Name of *Constantine* also being at the same Time counterfeited. They who obtruded this Sanction upon the Emperors *Carolus* and *Ludovicus*, as Part of the *Theodosian* Code, imposed upon them, and the Gloss on *Gratian* || is right, in bidding us—*Nota quod hæc Lex est tota abrogata nec habet locum hodie*—Remark that this Law is wholly abrogated, and is at this Time of no Force. And although in an antient Manuscript of mine, wrote about the Year 1120, it was a Part of the Title, *de Episcopis*, or of the second Title in the sixteenth Book of the *Theodosian* Code : and, as we have before said, together with the two others already mentioned, inserted in it : yet it cannot well be doubted, but that this was brought about by Fraud, in Favour of the Bishops, with a View of procuring to that Sanction, long before abrogated, and hitherto extravagant, a greater Authority ; the same Sanction being to be found in the more antient Codes, made Use of under *Charles* the Great, or about the Year 800, or 300 Years at least before the Date of my Manuscript, at the End of the *Theodosian* Code, by Way of Appendix. Yet it was, as well at that Time, as afterwards, frequently new moulded by some Impostors, with an Intent, it might be either taken as Part of the Eleventh Title, (in which, by the by,
its

its Abrogation by *Honorius*, as we have observed, is plainly contained) or that a new, or another Title, as this *de Episcopali Judicio*, should begin from it. And this and the other Sanctions joined unto it, are in the printed Editions, properly called *Extravagants*. And it is evident from the Capitularies before cited, that whatever Place it obtained, it must have been at the End of the Body of the *Theodosian Law*; but indeed it appears to me to have been a most manifest Fraud: and it is no Novelty to find spurious Laws † inserted in, and tacked to the Bodies of genuine ones: but we shall, God willing, treat elsewhere largely of this Sanction. To what we have hitherto said, concerning the Use of the *Theodosian Code*, considered as the Roman Law, during the Interval we are now upon, as well as after the Commencement of the Empire of *Charles the Great*, may be added, what often occurs, relating to that Point, in *Hincmarus*, (e) Archbishop of *Rheims*, who flourished about the Year 860. He in his Epistle about preventing Rapes, produces in evidence—*publicas Romanorum Leges*—the public Laws of the Romans—*quibus*—by which, says he—* *orbem universum vivere sub sua Dominatione constituerunt*—they decreed that the whole World should be governed—and quotes the very Laws contained in the *Theodosian* † Code, and those too, never received into the *Justinian*

† Vid. Alciat Parergon. b. c. 9. C. J.

* Hincmar. Epist. c. 5. p. 228. Edit. Sirmond. tom. 2.

† C. Theodos. li. 9. tit. 24.

(e) *Hincmar*, A. B. of *Rheims*. He vindicated the Rights of the *Gallican Church* against the Pope.

§ Hincmar. Epist.
c. 9. tit. ad le-
gem Julia de Ad-
ulteriis.

¶ C. Gregor. tit.
ad legem Juli. de
adulteriis.

† Hincmar. opusc.
55. capit. cap.
36. p. 527. 545.
780. 784. 796.
801. in tom. 2.
edit. Sirmond. et
p. 719. tom. 1.

* Tom. 2. p.
318. &c. Paris.
1645.

† Ivon. Decret.
part. 16. tit. de
caus. laicorum.
Sæ; 1. s. f. Ivon.
Pannorm l. 4. c.
127. 128. &c.
l. 5. c. 13. &c.

† Tritermius de
scriptoribus eccle-
siasticis Gesnerus.
Posselinus &c.

tinian Body—§ *Hincmarus* likewise, in the same Epistle, makes mention of the *Gregorian* Code. || He cites † other Places out of the *Theodosian* Body, as out of the then most received Promptuary of the Roman Law, often also adding the very *Anianean* Interpretation, annexed to the *Theodosian* Code. This Bishop gives us in his Epistle to *Charles* the Bald in Favour (a) of *Hincmarus* (b) *Laudunensis*, or of the Causes of Bishops, not long since, for the first Time, * published by *Sirmondus*, a most remarkable Specimen of this Matter. It is likewise very plain, as well from the *Decretum* † and *Pannormia* of *Ivo* (c) *Carnotensis*, or if you will *Pannomia*, and sometimes *Parnomia*, as it is called in a very antient and fair Manuscript in the Royal Library at St. *James's* (said by some † Lawyers to have furnished a Body of Canons before *Gratian*; others supposing *Hugo* (d) *Cathalaunensis* to be the Author) where the *Theodosian* Code is several Times applied as being then in Force; as from *Gratian*, § and other more antient Authors, from whom he made his Compila-
tion

(a) *Favour*. Others say he wrote against him. *Ayl*, Hist. Intro. to *Parergon*. p. 5.

(b) *Hincmare Laudunensis*. He was Bishop of *Leon* in *France*, and Nephew to *Hincmare*, A. B. of *Rheims*, and took the Popes Part against his Uncle.

(c) *Ivo Carnotensis*. He was Bishop of *Chartres* in *France*, and collected the *Decretum*, and *Pannormia*. See Chap. 6. S. 1.

(d) *Cathalaunensis* — *Chalons* in *France*; and some ascribe the *Pannormia* to him.

tion, in which are produced out of the *Theodosian* Code, many Things even under the Names of the antient *Pontiffs* and others, as is taken Notice of at the End of the same Code in the *Geneva* || and *Paris* † Editions, as well as in the *Prolegomena* of that excellent Person *David* * *Blondell*, prefixed to *Pseudo Isidorus*; how extremely Useful and important that Code was in the Studies of the curious and learned, during that Interval, when any Question arose relating to Matters of the Law. But it is past Doubt, that the Roman or *Theodosian* Law, by Means of the very different Customs and Laws of other Nations, which had for an Age before prevailed, began, at the End of the Interval we have been speaking of, or in the eleventh Century, to disappear, and to be openly neglected by Persons even most studious in the Law. For it is to be observed, that *Burchardus*, Archbishop of *Worms*, who flourished about the Year 1030, and compiled a Body of the Canon Law, not only did not insert into that Body, any Thing out of the *Theodosian* Code, considered as such; but also that in the *Lege Familiae S. Petri*, † composed by him, concerning the Right of Dowries, Inheritances, Contracts, public Decrees, and other forensic Mat-

§ Gratian, *Caus.*
2. quæst. 6. cap.
22. propter super-
fluum, &c.

|| C. *Theodos.*
Gene Edit. 1593
† C. *Theod. Paris.*
Edit. 1586.

* In *Prolegom.*
Dav. Blondell ad
Pseudo Isidorum.
c. 12.

† *Burchard.* Edi-
tio 1560. Colon.
Agrip.

(d) *Blondell*. A French Protestant of great Learning, who dyed in 1655, — He has fully proved *Indore's* Collection of the Decretal Epistles of the Popes of the three first Centuries to be all forged, and a shameless Imposture. *Collier*.

Matters, he has not borrowed any Thing from thence, nor in that Work imitated any Thing contained in the same Code; for which Reason, it is scarce credible, that the Use of the *Theodosian* Code, was at that Time so common in the Western Parts of Christendom, as it had been in former Ages.

CHAPTER VI.

SECT. I.

Though the Clergy now and then made Use both of the *Justinian* and *Theodosian* Codes; the former Body of Laws, as such, was notwithstanding from the Reign of the Emperor *Justinian*, or about the Year of our Lord 560, till the Beginning of the twelfth Century, or the Year of Christ 1130, or thereabouts, of no Force in the West, in Matters of public Government.

IT is, we are of Opinion, plain, that the modern Roman, or *Justinian* Body of Laws, considered as such, and as distinguished

guished from the antient *Theodosian*, for it is very different from this last, and often contrary to it, was no Way, except in the *Exarchate of Ravenna*, or in the other narrow Limits of the Eastern Empire in the West (and even these Remains entirely ceased about the Year of our Lord 750, to be a Part of that Empire) during the Interval from its first Appearance, or from the Reign of *Justinian*, or thereabouts, or near the Middle of the sixth Century, that is about the Year of our Lord 560 to the beginning of the 12th Century, or much about the Reign of the Emperor *Lotharius* the second, or for the Space of above five hundred and seventy Years, in Force in the public and civil Government of the West. § And little or nothing indeed is, during that Interval, by the Writers of the West, and that seldom, and but by few, quoted out of it. *Isidorus* above-cited, where he treats of the Authors of the Law, || mentions the *Theodosian*, *Gregorian*, and *Hermogenian* Codes, but takes no Notice of the *Justinean*, little or no Regard being then paid to it in the West. This Author flourished about one hundred and seventy Years after *Justinian*, some of whose Novells, as well as some Laws out of his Code, are a little before the Time of *Isidorus*, cited by *Gregory* the first. § It is plain also, that the *Justinean* Laws, or at least some of them, were, in the Ages succeeding that Interval, highly valued by the Wri-

§ Vi. Francise. Baldwin. in Prolegom. J. ris Civilis Alcat Pargon. 5. c. 25. et citata ad S. heic. 2.

|| *Isidor. Originum* lib. 5.

§ *Greg. 1. Epist.* 34. lib. 11. ad Joan. Defensorem. vi. *Gratian. Cause. 11. quest.* 1. c. 38.

Writers of the Hieratical Order, and Ecclesiastics. Perhaps likewise both the *Justinian* and *Theodosian* Laws, are in that anonymous Letter above cited † out of the Epistles of *Boniface* Archbishop of *Mentz*, wrote about the Year 750, understood under the Name of *Romanorum Legum*. And Pope *John* the eighth, as we read in the *Decretum*, § of *Ivo Carnotensis*, being about the Year 870, consulted by *Sineboldus* Archbishop of *Narbon*, in the *Tricassinian* (a) Synod, concerning the Violation of the Privileges of the Church, or as they called it *Sacrilege* (for which no Penalty was, either in *France* or *Spain*, appointed in the Book of the *Gothic* Law; by which alone those Nations were at that Time to be judged) says—*Nostra Serenitas cum Præscriptis Episcopis, inspectis Legibus Romanis, ubi habebatur de Sacrilegiis, invenimus ibi a Justiniano Imperatore legem compositionis sacrilegii constitutam, scilicet in quinque libras auri optimi* — Our Serenity and the Bishops appointed for that Purpose, having looked into the Roman Laws relating to *Sacrileges*, there find a Law constituted by the Emperor *Justinian* for the Punishment of that Crime, by a Mulct of five Pounds of pure Gold. That Law || of the Emperors *Arcadius* and *Honorius*, is

† C. Justin. l. 1.
s. 3. de Episcopis et Clericis.
l. 13.

(a) *Tricassinian* — *Troyes*, an Episcopal See in *Champagne*.

is indeed found in the aforesaid Code ; but at the same Time it is surprizing that they should not, unless they were not then provided with the Digest, take Notice of some Laws, much more severe, contained in the *Justinian* * body, against sacrilegious Persons. But how this Law, when it was to be found in the *Theodosian* Code, † which was then more generally received, as well as variously made Use of in *Italy, France, Spain* and *Germany*, should be at that Time in the West quoted out of the *Justinian* body, is still more difficult to account for. The very same, concerning Pope *John* the eighth, is likewise contained in *Ivo's Pannormia*, § except that 'tis in this Place read in the printed Editions—in *decem libras optimi Auri*—in ten Pounds of pure Gold — instead of *quinque*, five, which 'tis plain was the number in the *Justinian* Code. But both the Editions of the *Pannormia*, as well that of *Sebastianus Brantius* as of *Melchior Vosmedianus*, ought to be corrected, and *quinque* five, substituted in the Place of *decem* ten, as is further evident from a very antient and beautiful Copy of that Work in the Royal Library of St. *James's*. In the Council of *Paris* ‡ also, held in the Reign of the Emperor *Ludovicus Pius*, some Years before Pope *John* the eighth, or in the beginning of the ninth Century, there is produced that most famous and highly remarkable Novel of *Justinian's* concerning Excommunication, with this Addition,

I

Quam

* D. li. 48. tit. 13. ad legem Julianam peculatus L. 2. & 6.
† C. Theodos. tit. de Episcopis L. 34.

§ Ivo. Pannorm. lib. 2. c. 80. tit. de Sacrilegio.

‡ Ivo. Decret. part. 14. c. 21. Pannorm. lib. 5. c. 124. Gratian Caus. 24 quæst. 3. c. 1.

* Hincmar O-
puscul. 55. c. 29.
p. 509.

† Novelle. Jus-
tin. 123. c. 11.

§ Hincmar O-
puse 55. cap. 51.
p. 587. et Epist.
de presbyteris
criminosis. f.
31. p. 799. tom.
2 edit. Sirmondi.

Quam probat et servat Ecclesia, which the church approves of and observes; about which Time, *Hincmar*, Archbishop of *Rheims*, expressing his Sense of that very Novel, says,—*Proponam * tibi legalem Sententiam Justiniani Catholici Imperatoris quam probat et servat Ecclesia Catholica, qua Constitutione † decrevit ut nemo Episcopus, nemo Presbyter excommunicet aliquem antequam causa probetur propter quam Ecclesiastici Canones hoc fieri jubent.*—I will propose to you an Edict of *Justinian*, that Catholic Emperor, approved of and observed by the Church, by which he has decreed, That no Bishop or Priest should excommunicate any Person, till the Fact for which the Ecclesiastical Canons injoin such Excommunication be first proved. The same Prelate produces also proofs, from some other § of the Novels of *Justinian*—*quibus debitæ Observationis reverentiam Sancta Ecclesia exhibet*—which as he tells us, the Holy Church observes with all due Reverence. Moreover 'tis recorded in the same Century, that *Abbo*, Father of *Odo*, Abbot of *Cluny*, could repeat the History of the Antients, and the Novels of *Justinian* by heart, which 'tis probable he effected by his extreme Application to the Study of the Law; for it is added—*si quando lis quo quo modo inter Parentes fuisset exerta tanta in eum Censuræ excreverat veritatis ut undique omnes ad eum ob diffiniendi proficiscerentur gratiam*—that the World had such an extraordinary Opinion of his Decisions that every one, from all

all Parts, as often as any Contention arose among Relations, flocked to him, to decide their Cases. *John*, a Monk of *Cluny* † tells us thus much in the Life of his Master *Odo*. The aforesaid *Ivo Carnotensis* likewise, who flourished about the End of the same Interval, or in the 11th Century, speaks of *Justinian's* Novels as of Laws—*quas* || *Catholici Reges composuerunt et ex Auctoritate Romanæ Ecclesiæ populis servandas tradiderunt, et quas* * *commendat et servat Romana Ecclesia*—enacted by Catholic Kings, the Observance whereof, they, by the Authority of the Roman Church enjoined to Catholic People, and that the Roman Church approved of, and observed them—and the same Author borrows many remarkable passages on the subject he treats of, from thence. Tis plain also, that the aforesaid *Ivo*, as well as some others, from whom *Gratian* compiled his work, cited, during this Interval. several Passaegs, not only from the Novels, but the other Parts of the *Justinian* Body, namely the Institutes, Digest, and Code of that Emperor. With respect to *Ivo*, this is manifest, not only from his *Decretum*, † but from his *Panormia* || and *Epistles* § We frequently also meet with ‡ Laws in *Gratian*, taken according to his constant Custom, out of the *Justinian* Body. And indeed the above Authors, as well as some others produce during the above Interval, Laws, as being then in Force, both out of the *Justinian* and *Theodosian* body, though they sometimes conceal the Name

† *Journ. Cluniac. Monach. in vita Odonis p. 15 in Bibliotheca Cluniacensi.*

|| *Ivo. Carnolen. Epist. 242.*

* *Id. Epist. 230.*

† *Ivo. Decret. pars. 16. tit. de Causis laicis. passim.*

|| *Ivo. Pannorm. in prologo c. 33. et lib. 2. 146. 160. li. 3. c. 166 l. 5. c. 25. 45. &c.*

§ *Ivo. Epist. 99 112. &c.*

‡ *Gratian Caus. 2. quæst. 6. c. 28. 29. & 30. Caus. 10. quæst. 2. c. 2. &c.*

of the former Code. The *Theodosian* and *Justinian* Laws, though often opposite to each other, were, whenever they did not clash with the Canons, in like manner equally made Use of by the Clergy; who by this means composed out of this twofold Body, and the Canonical or Pontifical Law, with a View, according to their usual Practice, both to deceive, puzzle, and cheat the Laity, as occasion should offer, as well as to serve their own ends, that amazingly monstrous medley of Laws. But we no where find, that the *Justinian* Body of Laws, considered as such, was, during those Ages, made Use of in the civil or public Government,

S E C T. II.

The Revival under the Emperor of *Lotharius* the second, about the Year of our Lord 1130, of the *Justinian* Code in the West. Of *Irnerius*, called the first Illuminator, the Light of the Law, the first Author of *Glosses*, and who gave rise to the *Azo's*, *Accursius's*, and such other like Lawyers.

THE Authority and Use of the *Theodosian* Code, at the latter End of this Interval, greatly declining in the West, where

where, as far as the Customs of each Nation, and their respective Laws would allow, the aforesaid Body had, as we have shewn, so long, though variously prevailed; the thoroughly inquisitive made greater Use in their Studies of the more copious *Justinian* Body, as appears plain from *Ivo Carnotensis*, and *Anselmus Luccensis*; and from its being also cited in the Notes of the *Gregorian* Edition of *Gratian*. This *Anselmus* flourished about the Year 1080, and *Ivo*, who was his Cotemporary, as may be also seen in *Sigebertus*, *Tritemius*, and others, was from the *Abbatian* Dignity of St *Quintin* of *Beauvais*, which he enjoyed in the Year of our Lord 1078, translated in 1092, to the Bishoprick of *Chartres*. * *Roger Wendover*, *Matthew of Paris*, and *Matthew of Westminster*, expressly place his Death in the Year 1117, though † others date it, or conjecture that it happened some Years before, but the precise Time of his Death is put out of all doubt, by *Robert (a) de Torrinea*, who has, in his Manuscript Chronicle or Continuation of *Sigibertus*, positively confirmed it. And the *Justinian* Law was in so great esteem, even under the Emperor *Henry* the fifth, or about the Year 1120, in Decisions made in the Ecclesiastical Court; that some Part of the *Justinian* Law was also at the Instigation of the Hieratical Order, admitted, even under the Name of that Prince, both into the Imperial

* *Ivo Carnotensis*, Ep. 1.

† Vide sis testimon. vet. præfix Epist. ejus et Baron. tom 12. An. 1114. Calvis. 116. &c.

(a) See Note, c. 7. f. 4.

§ Vid. Leg. Longobard. li. 2. tit. 47 L. 11:

Antiq. collect. 1 lib. 1. tit. 34. et Anton. Augustini. bidem.

* Extra. tit. de jure Calumniz c. 1. Append. ad Concil. Lateran. 2 pars. 23. c. 1.

† C. Just. li. 1. tit. 3. de Episcopis et Clericis L. 25.

§ Odofred. ad. L. 5. Jus civile est D. li. 1. tit. 1. de Just. et Jure.

rial Edict, § about the Oath relating to Calumny, as well as into the Decree of *Honorius* * the second, concerning the same Matter. The Emperor *Martianus*'s sanction also, erroneously in the printed Editions, called *Marcus*, is cited in that Edict and Decree, as taken from the *Justinian* Code, † it not being to be found among the Novels of the Emperor *Martian*, annexed to the *Theodosian* Code. And Persons of Learning, considering the *Pandeets*, together with the other Parts of the *Justinian* Body, as an invaluable Treasure of the Law of Nature and nations; afterwards, about the middle of the twelfth Century, or a little before that time, much about the Year of our Lord 1130, resorted to *Bononia*, to make public Lectures on the *Justinian* Body of Laws. *Pepo*, a Person no way renowned, nor appointed by public Authority, was the first of these, who began his Expositions. *Irnerius*, called also *Yrnerius*, and *Wernerius*, the first Author of *Glosses*, Contemporary with *Pepo*, became, a little afterwards, the most considerable in this Method of Instruction. *Odofredus* § says, that *Dominus Irnerius fuit, apud nos Lucerna Juris, id est primus qui docuit in Civitate ipsa, nam primo cepit studium esse in civitate ista in artibus, et cum Studium esset destructum, Romæ, libri Legales fuerunt deportati, ad Civitatem Ravennæ, et de Ravenna ad Civitatem istam. Quidam Dominus Pepo cepit auctoritate sua legere in legibus. Tamen qui-*

quicquid fuerit de Scientia sua nullius nominis fuit. Sed Dominus Irnerius dum doceret in artibus in civitate ipsa cum fuerunt deportati libri legales, cepit per se studere in libris nostris et studendo cepit docere in legibus. Ei ipse fuit maximi nominis, et fuit primus Illuminator Scientiæ nostræ, et quia primus fuit qui fecit Glossas in libris nostris vocamus eum, Lucernam Juris.——

Master Irnerius was, in our Parts, the Light of the Law, that is the principal Person, who publicly taught the Civil Law in that City, (to wit, *Bononia*,) for the Arts and Sciences began in that Age first to flourish there, and after learning had been banished from *Rome*, the Law-Libraries were removed to the City of *Ravenna*, and from thence to *Bononia*. One Master *Pepo*, by his own Authority began Readings on the Laws; yet, whatever his Knowledge was in his Profession, he did not thereby gain any Reputation. But Master *Irnerius*, at the same Time that he taught other Sciences in *Bononia*, began, after the Books of the Law were brought thither, to apply himself in private to the Study of those Books, and opened, whilst he was studying them, his Lectures on the Laws, and was held in the highest repute, and was the first who gave Light to our Civil Law in *Bononia*; and we, from his having been the first who wrote *Glosses* on our Books, style him the Light of the Law—and it is || reported, that this same *Irnerius*, who, as the above men-

|| Innocent Cy-
observat. Juris.
Caon. l. 5. c. 5.

† Odofred. Jul.
ult. C. l. 1, 2.
tit. 50. de in-
tegrum restitut.

tioned *Odofredus* † testifies, taught also o-
ther Sciences in *Bononia*, before he became
Professor of the Laws, learnt the Civil
Law at *Constantinople*, where the Study of
it then flourished. And soon afterwards
the Emperor *Lotharius* (a) the second was
so highly pleased with this Academical Re-
vival of the Law at *Bononia*, that, *ex uno*
jure civili Romano posthac judicia fieri lege

I 4

is

(a) *Lotharius* the Saxon Emperor of the West waging
war, against *Rog r* Duke of *Apulia*, or (as others call
him) King of *Sicily*, and imploring the Aid of the Com-
monwealth of *Pisa* (then a Free State) first discovered and
found out that part of the Civil Law which is contained
in the Digests or *Pandects*, upon destroying the City of
Amalphis or *Amalfis*, near *Salernum*, in *Apulia*, written in
very antient Characters or Capital Letters connected and
running into each other, without any interstice of words
or distance observed between them. The people of *Pisa*,
who assisted the said Emperor in this War with their Fleet,
in Honour of their gallant Atchievements begged this
Book of him, as a Reward of the Service done him by
their Navy. And thus it was given to the City of *Pisa*,
there to remain as a memorial of their good Service: whi-
ther all the Doctors resorted, upon any Dispute about the
Sense of the Law, in order to consult the same. But when
the City of *Pisa*, was reduced and taken in the Year 1406
by *Ciponius* General of the *Florentine* Army, after a long
Siege, it was removed from thence, and carried to *Florence*,
as a part of his Triumph, where it is now very carefully
and religiously kept in the Great Duke of *Florence's* Li-
brary consisting of Two Volumes bound in Crimson Vel-
vet, and adorned with silver Clasps and Plates: and hence
these Books are stiled the *Florentine Pandects*, or the *Pan-*
decks of *Pisa*. And this Book or Code of Laws was for-
merly in so great esteem and Veneration, that whenever it
was brought forth and exposed to any Person's View, it
was performed with the Solemnity of lighted Torches,
and with a certain Number of Monks standing round a-
bout it uncovered, in the presence of the Great Duke or
Chief Magistrate. *Ayliff's Prelim. Discourse Civ. Law,*
p. 38.

is sanxerit—He enacted a law, that from that time Causes should be decided only according to the one *Roman* Body of the Civil Law (to wit the *Justinian* which now came in the Room of the antient *Theodosian* Body much after the same Manner as the *Aristotelian* Philosophy took Place of the *Platonic*) which *Carolus* (b) *Sigonius* * tells us ——— *Constantem doctorum hominum in monumentis esse famam* ——— redounds to the immortal Fame of learned Men——

* Carol. Sigonius de reg. Ital. l. 11. et vid. eum. l. 7. in Ottone magno.

And the same Author informs us—*ante hoc tempus Italici certe alii Longobardica, alii salica, alii Romana lege utebantur. In posterum autem omnes uni juri, unigue legi, reliquis abrogatis, nempe Romanæ obtemperarunt; jusque civile publicis Italiæ in gymnasiis majore celebrari studio et diligentiori coli opera cæptum* — that some of the *Italians*, before that Time made Use of the *Longobardic*, others of the *Salic*, and some of the *Roman* Law (that is of the *Theodosian*) but that afterwards, all were content to be governed by one Body of Rights and Laws, to wit the *Roman* (or *Justinian*) the others being abrogated; and the Civil Law began at that Time, by the assiduous Application to the Study of it, to be more and more famous, and to be daily much more cul-

(b) *Sigonius*, born at *Modena* in *Italy*, he was Professor of the *Greek* Tongue in that City when he was but 22 Years of Age, he is the Author of many excellent Treatises, and dyed in 1585 being 60 years of age. *Collier*.

† Angel Politi-
an. Epis. l. 10
Marquardo Brei-
sachio. et mox.
cicati.

cultivated in the public Schools of *Italy*. Now it happened that the *Pandects* which the *Civilians* formerly called *Pisanas* — *Pisan*, and *literam Pisanam* † — the *Pisan* Text (from *Lotharius*'s having removed them thither) just as they are now called *Florentinas*, *Florentines* — because they are preserved as an inestimable Treasure in the Library of *Medicis* at *Florence*, and which are more Valuable than any other Copy, both on Account of their Antiquity and Authority, were, about the Year 1137, or soon after the taking the City *Amalphis*, in the War carried on by the Emperor *Lotharius* against *Roger* the *Norman*, found among the Spoils of that City. And it is plain from the above *Odofredus*, that other Parts likewise of the *Justinian* Body of Law, were about the same Time dug up near *Ravenna*: and from thence forward, the Study of the *Imperial* Law began chiefly to flourish. *Sigonius* also in another Place says, that Anno 1102, *Irnerius Philosophus Bononia docens, Matildis rogatu, Pandectas interpretari cepit et primus Glossas in eas scripsit*. — *Irnerius* the Philosopher, Professor at *Bononia*, began in the Year of our Lord 1102, at the Desire of *Matilda*, his Interpretations on the *Pandects*, and was the first who wrote *Glosses* on them. — Thus the above Author in the Argument to his History of *Bononia*. And *Conrad*, Abbot of *Ursperg* (c) relates the

(c) *Conrad* Abbot of *Ursperg*. He lived in the 13th Century, and wrote a Chronicle beginning with *Belus* King of the

the same of that most celebrated Countess *Matilda*, Daughter of *Boniface*, Duke of *Tuscany*, at the End of his Works. But as *Irnerius* † lived to the Year 1190, or thereabouts, it can scarce, on Account of his Years be credited, that he could discharge this Office at the Desire of *Matilda* in the Year of Lord 1102, that Countess having died * in the Year 1115, or several Years, according to the general received Opinion, before *Irnerius* was Professor at *Bononia*, to wit, in the Reign of the Emperor *Henry* the 5th, and about ten Years before the Beginning of that of the Emperor *Lotharius*. Neither do I indeed believe that the Piece at the End of *Urspergensis*, relating to *Irnerius* and *Matilda*, was wrote by that Author; but am rather inclined to think that it was, without grounds, annexed to his Work by some other Writer, *Urspergensis* having before inserted in the Body of his Chronicle every thing proper, relating to the revival of the aforesaid Imperial Law under *Lotharius*. Nor can I account for its being added at the End, that *Gratian* wrote at that Time (which coincides with the Year of our Lord 1150, or with the Reign of the Emperor *Frederic* the first) and that then, — *eisdem quoque temporibus*
Do-

† Iv. Ficardus in
vitis Jurisconsulte
Guidus Pauzirol.
de claris Leg.
Inter, l. 2. c. 13
&c.

* Sigen de regno
Italiz l. 10.

the *Affyrians* to the Year 1229. The *Præmonstratenſian* Abby, of *Ursperg* within the Diocess of *Augsburg* lies betwixt the Rivers *Kamblack* and *Mindel* near their Conflux, where they run into the Danube. Collier — *Busching's Geo.* v. 5. p. 248.

*Dominus Wernerius libros legum qui dudum neglecti fuerant, nec Quisnam in eis studuerat, ad Petitionem Matildæ Comitissæ renovavit et secundum quod olim a divæ Recor-
 dationis Imperatore Justiniano compilati fuerant, paucis forte verbis alicubi interpositis, &c.*——to wit, about the same Time also, Master *Wernerius*, at the Desire of Countess *Matilda*, brought into Repute the Books of the Law, which had, no one studying in them, been for a long time neglected, just as they had been formerly compiled by the Emperor *Justinian*, of blessed Memory, a few Words perhaps here and there only added, &c. —— All which seems but badly connected with what is related by the above Chronographer; for *Urspergensis* flourished about the Year of our Lord 1230. But if you would be further informed concerning the Revival of the *Justinian* Law in the West, such as we have represented it, consult, besides the abovementioned Authors, *Tiberius Decianus*, † *Franciscus Baldwinus*, § *Valentinus Forsterus*, || *Joannes Fichardus*, ‡ *Guidus Panzirollus* * the three last of which wrote the Lives of the Lawyers, even after the *Justinian* Law had been thus revived. *Wolfgangus Freymonius*, † *Paulus Merula*, || *Innocentius Cyronius*, § and others also quoted by them. About this Time we also meet with, in the public Tables of the *Roman* or *German* Empire, the Name ‡ of *Justinian*

† Tib. Derian.
 zoologia adversus
 Alciat. de Juris-
 con. respons. c.
 8. f. 6. &c.

§ Fran. Bald. in
 Prolegom. de ju-
 civili.

|| Val. Forst. in
 Histo. jur. civilis
 † Jo. Fichard. de
 vitis juris consul-
 torum.

* Guid. Panzi-
 rol. de clar. le-
 gum. Interpret.
 l. 2. c. 3 & 13.

† Wolfgang.
 Freymon. in
 Symphon. Juris

|| Paul. Merul.
 Cosmograph. par
 2 l. 4. c. 23.

§ Inno. Cyron.
 observat. Jur.
 Canon. l. 5. c. 5.

‡ Goldast. Cou-
 tit. Imperial.

Rom. 2. p. 261.

tinian, as of a preceding deceased Emperor, from whom the succeeding Emperors chiefly derived their succession. Whence also the *Roman* Senators addressed the abovementioned Emperor *Lotharius* on the same subject, in the following Verses,

Rex valeat, quicquid cupit obtineat, super
(Hostes
Imperium teneat, Romæ sedeat, regat Or-
(bem.

Princeps Terrarum, ceu fecit Justinianus,
Cæsar accipiat Cæsar, &c.

Pope *Hadrian* the fourth, * writing to the Bishops of Germany, speaks to the same Purpose, concerning the aforesaid Use of the Name of *Justinian*. And the Study of the *Justinian* Law, soon after extended itself to *Montpelier* in *France*, as well as to *Spain*, and other Nations, and that Emperor's Body of Laws was made Use of in Matters of public Government,

* Goldast. Con-
stit. Imperial.
tom. I. p. 226,

S E C T. III.

All the other Sciences, till then as it were buried, began about the same Time, to be revived in the Western Parts of Christendom.

UPON so remarkable a Revival of the *Justinian* Law, such as we have represented it, 'tis worth Notice to observe, that the Pontifical Law likewise, as well as the other Sciences, were in that age, and about the same Time, greatly restored throughout the Western Parts of Europe. For all the liberal Arts and Sciences had lain, except in the Schools of the (a) *Arabian* † *Africans*, and in the Parts of *Spain*, contiguous to them, too long neglected and unknown, throughout the West. Even Logic itself, the means both of attaining to, and of regulating the other Sciences, was,
as

† Vi. Joan. Saris. burienf. in metalogico. l. 4. c. 6. &c.

(a) We must not think that the *Arabs*, tho' they were *Mahometans*, were ignorant and illiterate; for having subdued many Countries of the *Roman* Empire, and ravaged many Provinces of *Asia*, they, amongst the Spoils and Booty, they had made in *Greece*, by chance found some Books, and applied themselves with great Eagerness to the Study of Learning; and they were so keen, that about the Year 820, they made the *Califf Almanon* demand of the Emperor of *Constantinople* the best *Greek* Books, which when they had got, they caused them all to be translated into *Arabic*; and when Learning was at the lowest Ebb in *Italy*, the *Arabs* studied with the greatest application.

Ogilv. History Naples v. 1. p. 488, 489.

as an Art,—*cujus Dogmata Sophismata essent, et quasi sacræ lectioni contrariæ*—whose Precepts were looked upon but as mere Sophisms, and in some measure contrary to the Holy Scriptures, held in utter || Execration, and Theology was but too often also, on that Account, handled by Persons, wholly unequal to the task. But now as Metaphysics, Natural Philosophy, Ethics, Logic, Medecin, and the Mathematics, which like so many Stars, darkened by Clouds, had been for a long Time before eclipsed, began, as it were at once, by Means of the *Arabic* Versions and Interpretations, such as they were, of some antient *Greek* Authots, to shine forth about the Middle of the 12th Century; so likewise, as we learn from the Decretum of *Gratian*, and the Sentences put forth by *Peter Lombard*, who lived at the Time of the aforesaid Restoration of Learning, the Pontifical Laws also, as well as Theology itself, were revived. And as to Theology, what follows concerning *Robert Pullein* an *Oxonian* deserves in this Place to be remarked. In the Year of our Lord 1133, —*Magister Robertus Pullein Scripturas divinas quæ in Anglia obsoluerant apud Oxonium legere cæpit. Et postea cum ex Doctrina ejus Ecclesia tam Anglicana quam Gallicana plurimum profecisset a Papa Lucio secundo vocatus et in Cancellarium sanctæ Romanæ Ecclesiæ promotus est,*—Master Robert

|| Petrus Abba
lardus, Epist. 4.
Et vid. Joan. Sa-
rif. Metalogic. l.
4. c. 24. & 25.

* Mis. in Bib.
liothec. Cotto-
nian. De ex. vid.
plura in *Antiquum*
ex Bottono Bu-
rien.
do, apud Jo. Ba-
laeum Cente 2.
Script. 80. 21.
Jo. Antiseum set.
12. Scrip. 203.
atque ex I. Roi-
so. apud Briau.
Twinum in An-
tiq. Oxoniensibus
p. 108.

bert Pullein (thus *Thomas Wikes*,* (d) Canon of *Osney*) began Lectures at Oxford on the sacred Scriptures, which had been before disused in England, And he was afterwards (the *Gallican* and *English* Churches having received great Benefit from his Instructions) sent for by Pope *Lucius* the second (about the Year 1145) and promoted to be Chancellor of the holy *Roman* Church. And thus indeed all the Sciences, having been as it were so long buried, began again, in some measure, almost at the same time to revive and flourish. This Revolution with Regard to Learning, which happened about the Reign of the Emperor *Lotbarius*, was very much forwarded under the Emperors *Conrad* and *Frederic* the first.

(d) *Thomas Wikes* Canon of *Osney*. His History begins at the Conquest, and ends at the Death of *Edw.* 1st. 1304. *Rapin*.

S E C T.

S E C T. IV.

Under what Restrictions the Use of the *Justinian* Law, thus revived in the West, was allowed of in *France, Spain, Lusitania, Italy, Germany*, and elsewhere.

BUT as to what relates to the more antient *Roman* or *Justinian* Law, thus revived in the Empire, it is not to be understood in that sense, as if all the other precedent Laws in force, were so entirely and really abrogated (which last Word *Sigonius* makes Use of) that the Body of the *Justinian* Laws alone had so far taken place, that no other was afterwards of any force, or that as the Law of the 12 Tables formerly brought from *Athens* to *Rome*, it derived its Authority from itself; but that the Use of the *Justinian* Law was in such a Manner received, that as often as either Reason or Analogy was necessary to interpret the antient or modern Laws, or that neither a Custom, or an express Law could be found, Recourse was then had to that *Justinian* Body of Laws; both as being the best and richest Promptuary, with regard to Points of Law, as well as that it from Reason and Analogy happily supplied a Law in Cases at that time undecided. It is certain the antient *Romans*, with regard to the Marine, admitted much after the same manner of the *Rhodian* Law, as we and our neighbouring Nations

K

tions do of the *Oleronian* ; (a) yet at the same time, neither of these Laws acquired that Power, by Virtue of any Authority of their own which they received on their being first enacted. And as several other Academies thro' the Western Parts of *Europe*, in the Prosecution of their Studies, in Process of Time, herein imitated that of *Bononia* ; thus likewise other Kingdoms and Republics, in their Use of the Imperial Law, partly copyed after the Empire, retaining at all times and Places their own antient Customs and Laws before enacted, as no way depending on the *Justinian* Body, according to the respective different Form of each Government ; as well as the Liberty of enacting and making Use of new ones. Neither was that Imperial Law, as such, any where followed in the West, as the simple Rule of Right ; but admitted only with the Moderations, we have just mentioned ; which is plain to any one, as well from the numerous Volumes of the various Customs and Sanctions which the *French*, *Spaniards*, *Bohemians*, *Hungarians*, *Polonians*, *Sicilians*, *Dutch*, *Italians*, and the several *German* Republics, and others make use of, as from the numberless Decisions and Commentaries on them, every where to be met with. The Feudal Laws or customs moreover of the *Lombards*, compiled in the same Age by *Gerard Niger*, and *Obertus de Orto*, Cunsuls of *Millan*, as well as some Sanctions of the later Emperors, which, merely as rational, are often also in like Manner, received beyond the limits

(a) See Note p. 54.

limits of the *Roman* Empire, were usually joined in one Body with the *Justinian* Laws.

There is, in a *Lusitanic* * Constitution concerning this Matter, a remarkable Instance of the imperial Law, being received in the manner we have mentioned. Where any Law Suit arose, relating to a subject, about which neither the Laws or Customs of the Kingdom have decreed any Thing, (and not otherwise) *sendo materia que nom fragua peccado ; maudamos que jeia julgado po las leis Imperiales posto que es sacros Canones deferminem, o contrario: as quas leis imperia es Maudamos soamente guardar po la boa razam em que sam faudadas*, to wit, in civil Affairs,

then it was to be decided by the Imperial Law, unless the sacred Canons were opposite. Nor do other Nations of the West, which have received that Law, at present act differently. Consult as to what relates to the *Spaniards* in this point, *Gregorius Lopez* † upon the *Partites* and *Alphonfus de Azevedo* upon the Royal Constitutions. || As to the *French* ; says *Choppin* § *Nos Galli de Quiritium jure ita censemus, eo scilicet uti nos, quatenus ei Lex Gallica non refragetur* — We *French* form this Judgment concerning the Imperial Law, to wit, that we make use of it, so far as the *Gallican* Law is not opposed by it. *Bodinus*, *Gulielmus Ranchinus*, ‡ *Rebuffus*, * *Carolus a Grassaliis*, and others easy to be met with, speak to the same Purpose. Nay even all Kind of Study of the Imperial Law, was afterwards forbid in the Univer-

* Ordinazores o libro. 2. tit. 5.

† Greg. Lopez. Gl. ad L. 6. tit. 4. partit. 3.

|| Alphonf. de Azevedo tit. 1. lib. 2. et vid. Oldrad. Consil. 69.

§ Choppin de Demanio Francie l. 2. tit. 15. f. 5.

† Bodin. de Repub. lib. 1. c. 8.

* Gul. Ranchinus var. lection. l. 2. c. 3.

† Rebuffus, tom 1. Constit. tit. de Constit. in processu. gl. 5. num. 20.

§ Carol. a Grassaliis. Regalium. Francie l. 1. juce 2. & 12.

Add. Extra. tit. de privilegiis c. 28 super specula Compilat. 5. l. 5. tit. 12. c. 3.

Atque ibi In. Cyron uti etiam Observat Jur. Canon. l. 5. 5.

† Extra. tit. de
privilegiis c. 28.

§ Vid. Paridem
de Putero. Trac-
tat. de Syndica-
tu Verb. Testis
§. Fui femel.
rum. 9 et. Min-
sing. Cent 5. Ob-
servat. 88.

|| Andraeas de
Ifernina in lect.
petezina.

† Carol. Tapia
in jura regni Nea-
polit. l. 1. tit 13.
§. Justitiam.

* Andraeas Mol-
fesius in Consuet.
Neapolit.

part. 6. par. 8.
num 23. &c.

† Maius Muta
in Capit. reg. Si-
ciliae tom. 1. c.
33. num. 203.
&c.

§ Bartol. de dif-
ferent. juris Ci-
et. Longobardo-
rum.

§ Fran. Suarez.
de leg. 1. 3. c. 8.

sity of *Paris*, † or in the Places adjacent to it, as well as all Citations whatsoever out of the same Law, both in the Courts, and elsewhere § throughout *France*. With regard likewise to the Empire itself, or *Germany* and *Italy*, it is plain, that in Decisions, several other Laws and Customs must of Necessity be made Use of in those Nations. See concerning the Use as well of the Laws of the *Lombards*, as of the *Franks*, besides the *Roman*, in the Kingdoms of *Naples* and *Sicily*, after the *Justinian* Law was thus revived in the West, *Andraeas de Ifernina*, || *Carolus Tapia*, † *Andraeas Molfesius*,* *Marius Muta*, † together with *Bartolus*, § and the golden Additions of *Julius Ferettus* to his Writings. And on this Head, exclusive of the numberless Decisions in which other Laws as well as the *Justinian* are frequently cited, the common Collections of the Constitutions, both antient and modern in the *German* empire, and of its Customs, very different from the *Justinian* Laws, are to be consulted ; but especially that of *Melchior Goldastus* with his *Prologomenas* upon it. The People too in the Empire, as well as Kingdoms and particular Cities, often visibly abound with a great Number of their own respective Laws and Customs. Consult likewise on this Matter, *Franciscus Suarez*, § in his Books of the Laws. And altho' this imperial Law is also made Use of both in the Courts and Universities of *Scotland*, yet this Use, is no other than that of

a foreign Law, which furnishes Disputants with Reasons in themselves most excellent, not as of a Law obtaining any authority at all, as such; for it is in that Nation expressly provided * by their acts of Parliament, that no other Laws shall be of any Force there, except———*quæ sunt regni et communes Regni*——the Statutes and common Laws of the Realm. But we have treated fully enough of this Matter.

* Par. 3. Ja. 1
c. 24.
Parl. 6. Ja. 4.
c. 79.

S E C T. V.

A Conjecture how it happened that the *Justinian* Law, was in the Reign of the Emperor *Lotharius* the 2d, or in the abovementioned Age, so freely embraced by the Christian Princes, and the People in the West.

WE are of Opinion, that so many Christian Princes and People, throughout the West, the more willingly and heartily admitted the Use, such as it was, of the Imperial Law, thus revived; by how much the more, Pope *Innocent* the 2d, about the same time, and that too to the manifestly and highly odious Infringement of the Civil Government, earnestly pressed them to receive every where the Papal Decrees, collected by his Authority, as the only body of Laws,

* Orderic. Vital.
Hist. Ecclesiastic.
l. 13. p. 919.

according to which they were to regulate their Actions. *Ordericus Vitalis* (a) the Monk, * making mention of a general Council held at Rome by this Pope, and of those who resorted thither, says—*Multa eis Papa de priscis codicibus propalavit, in signemq; sacrorum Drecretorum textum concessit. Sed nimis abundans per universam orbem nequitia terrigenarum Corda contra ecclesiastica scita obduravit.*——This Pope opened unto them many things out of the antient Codes, and compiled a celebrated Text of sacred Decrees; but the Hearts of earthly minded Persons, thro' the wickedness, which then too much abounded throughout the World, were hardened against the Ecclesiastical Decrees. Thus with Effrontery, Priests puffed up with Ambition, usually bellow out against those, who with Honesty and Piety are refractory to those wicked Arts, which they make use of to delude and cozen both Princes and People, *unde remeantibus ad sua magistris apostolica Decreta passim per regna divulgata sunt, sed nihil, ut manifeste patet, oppressis et opem desiderantibus profuerunt, quoniam a Principibus et Optimatibus Regnorum cum subjectis plebibus parvi pensa sunt*—from whence the Fathers returning to their own Countries, the Apostolical Decrees were pub-

(a) *Ordericus Vitalis*, born at *Attingesham* on the *Severn*, in the Year 1075. He wrote Thirteen Books of Ecclesiastical History which begin with the Nativity of our Saviour and come down to the Year 1142. *Collier*.

published throughout various Kingdoms; though plainly of no Use to the oppressed and to such as applyed for Redress, because little Respect was paid to them by the Princes and Grandees of the Kingdoms, or by the common People subject to them——

It is probable indeed, that this is the very body of Decrees, which being immediately afterwards confirmed by Pope *Eugenius* the 2d, and published under the Name of *Gratian*, is now become the first and most famous part of the Canon Law. For as soon as the Emperors ordered public Lectures on the Imperial Law at *Bononia*, and appointed for that purpose a peculiar Faculty in the Univerfity of the fame City; the aforesaid Pope *Eugenius* also ordered the like to be done, with regard to the Papal Law contained in the Body of *Gratian*. ||

Now || Chronic. Chro-
nicorum. what Pope *Innocent* did, coincides with the year 1139. And I persuade myself, that as this Pope, dreaded lest the Imperial Law, as such, then beginning to revive in the West, should gain too great a Footing; he therefore craftily obtruded on the World the papal Decrees, which before this time were different, according to the various Customs of Nations and People, and not so uniform as they were afterwards looked upon to be. But lest the papal Laws should be in too great vogue in the Univerfities, and consequently prevail too much in Matters of public Government, The Princes and most of the Republics also in the West, consider-

ing the Imperial Law, as a Bulwark in favour of their Priviledges against the Pontifical Artifices, cherished and set a great Value upon it. And as the Court of *Rome* afterwards consented, that the civil Law should be publicly admitted, ‡ where their Canons were not opposite to it; so indeed did the Princes and Republics in their Turn, for the most part, receive the Pontifical Canons, whensoever they were not repugnant, either to the Imperial Law where received, or to the Customs or Laws of the Country.

¶ Vid. Extra. tit. de novi operis munt c. 1. Extra. tit. de privilegiis c. 28. sup specula. Adde Alexandri 3. Epistolam sub annum 1180 subjunctam Petro Cellensi p. 421

CHAPTER VII.

SECT. I.

Our Nation made no Use in their public Government, from the End of the *Roman* Empire here, to the revival of the *Justinian* Law in the West; that is for 700 Years and upwards, either of the *Theodosian* or *Justinian* Body of Laws. — The Imperial Laws were brought into England about the Year of our Lord, 1140, being the same Time they began to be studied again in *Bononia*.

THE antient Imperial Law, called the *Theodosian*, as well as the more modern or *Justinian*, was made Use of, in the Manner above compendiously shewn, down to the Middle of the 12th Century, or somewhat before, thro' those Parts of the West, in which the *Goths*, *Lombards*, and others settled; among whom, the *Theodosian* Body of Laws, was, as we have before related,

variously received. In short, none but the Learned in their Studies, Writers and the Clergy in their Decrees and Transactions, made use, during that interval, except in the narrow Confines of the *Exarchate* (a) of *Ravenna*, of the *Justinian Law* in the West. And therefore that Law was not received among us, who never made use, during that Interval, as other Nations did, even of the *Theodosian Code*. For when the *Anglosaxons*, about the End of the *Roman Government* here, arrived in this nation, and, as is well known from our own Historians, divided the Realm into Kingdoms, which they distributed among themselves; they did not, as other Northern Nations, who over ran the Southern Parts of *Europe*, receive the *Theodosian Body* of Imperial Laws, as then, either not at all subsisting, or having but just made its Appearance; much less at that time introduced into *Britain*: nor did they indeed, admit of any other Body of the like Nature, but made Use only of their own Customs, which they brought with them from *Germany*. And as the Laws among the *Goths*, and others, who settled in *Italy*, *France* and *Spain*, were, according to their respective nations, called either *Gothic*, *Longobardic* *Salic*, as well as by other such Names; so likewise among our *Anglo Saxons*, there was the Law of the *Mercians*, and of the *East*.

(a) See Note p. 83,

East Saxons; and after that, the Law of the Danes was variously admitted; yet the Roman Law, was never, during that Interval, allowed of here, as it was among those foreign Nations: it being manifest, that no Traces of the Imperial Law, as such, can be found among our Ancestors, during that Time, or for upwards of seven hundred Years in their public Government; though I make no doubt, but that some of our own learned Men in this Nation, as well as the Studious in foreign Parts, were acquainted, at least in Part, with the Imperial Law. And we have all the Reason to believe, that, as far as some Heads or Sentences of the Imperial Law, might have been thrown into the Pontifical Canons, some Use was at that Time made, in Matters of Ecclesiastical Discipline, of the Imperial Law, among us; though it never obtained any Authority at all, in the Administration of our civil Government. But after, first the *Anglo Saxons*, then the *Danes*, and lastly the *Normans*, (all well enough comprehended under one and the same line of Kings) had from the end of the Roman Government here, that is for seven hundred years or upwards, made use, without any Mixture of the Roman or imperial Law, of their own peculiar Laws, now called by us, the common Law of *England*; though variously, as it must always happen, altered according to the different State of Affairs, at last, to wit, about the same Time, as hath been

been shewn, that the Emperor *Lotharius* and his immediate Successors, introduced the Use of the *Justinian* Law into Matters of public Government, both the *Theodosian* and *Justinian* Bodies, though seldom, if ever, either intire or in parts, seen publicly here before, were at that time brought into *England*. And at length the *Justinian* Body (notwithstanding it was at first, as we shall presently shew, so much disliked among us, as to be prohibited by a public Edict) was, for many Years, made use of by some of our own Lawyers here in forensic Affairs, as it was at that Time by other Nations.

Now with Regard to this Matter, four things are here chiefly to be considered.

The 1st. Is the precise time, when both the *Theodosian*, and *Justinian* Imperial Laws were, in the Manner we have related, first brought into our Nation, and by whom they were thus introduced.

The 2d. The Admission, Progress, and Use likewise of the *Justinian* Body in our Universities and in the Kings Courts, where the Proceedings had been according to the Laws of *England*.

The 3d. At what Time the antient Use of that Law was laid aside, and reduced to the narrow limits, within which it has for some Ages past been confined and restrained.

And lastly the 4th, How it happened that our Ancestors thus laid it a aside or contracted it within such narrow Bounds.

We

We shall, in what follows, treat of each of these Heads, as well as of some other Matters connected with them.

S E C T. II.

In this Section 'tis proved, that the *Theodosian* Law or Code, was introduced about the Year 1140, into *England*.

THE Proofs, with Regard to the first Point, that is, at what Time the *Theodosian* and *Justinian* Laws were brought into *England*, are plain enough. It appears from *William* a Monk of *Malmbsbury*, (a) one of the most learned and correct Writers of his Age, that the *Theodosian* Body was received here, about the time he flourished, by the Learned in their studies. This Author having reduced into an Epitome or Abridgement, as he himself calls it, the Works of *Haymo Floriacensis*, (b) concerning the Lives of the Emperors from *Justinian*

(a) *William* of *Malmbsbury*. He has made a judicious Collection of whatever he found on Record, from the Arrival of the *Saxons* to the 8th Year of the Reign of King *Stephen*, 1142.

(b) *Haymo Floriacensis* (or *Fluery*) a Monk of a Monastery in *Yorkshire* of the Order of *St. Benedi^c*.——He flourished about the Year 1010, *Pitts. Tanner. Bibl. Brit. Hy.* p. 386.

* Balgus, Cent.
2. scrip. 73.
Pitfeus, æt. 12.
Scrip. 201.

nian to *Charles* the great, and traced the Succession of the *Cæsars*, who reigned after him, down to the death of the Emperor *Henry* the 5th, the immediate Predecessor of *Lotharius* the 2d, or to his own times, for he then flourished, to wit, from the Year of our Lord, 1125, or thereabouts, to the Year 1142, at which time * he in the Reign of King *Stephen* dyed) the aforesaid author, I say immediately adds (as is contained in a very antient Manuscript now by me, and which, I'm of opinion, was penned as early as the time of the above *William* of *Malm-sbury*. *Nunc quicquid de Principibus Italiæ et Romæ potuimas invenire, curavimus non omittere Congruum videtur leges Romanorum apponere Non eas quas Justinianus fecit. Esset enim hoc iugentis operis et Laboris. Sed eas quas Theodosius minor filius Archadii a temporibus Cùstantii usque sub titulo uniuscujusq; Imperatoris collegit. Ponantur ergo 16 Libri ab eo collecti, quorum Sententiæ plures explanantur. Quædam Explanatione non egent. Divi Theodosii ejusdem Novellarum liber 1. Divi Valentiniani filii Placidia liber 1. Divi Martiani orientalis liber 1. Divi Anthonii et Leonis liber 1. Divi Majoriani liber 1.* Having taken Care to omit nothing we could find relating to the Princes of *Italy* and *Rome*. We now think proper to add here the *Roman* Laws, not indeed those enacted by *Justinian*, for that would be a great and laborious Undertaking, but such only as the Emperor *Theodosius* the Younger, Son of *Arcadias*, collected, and that un-

under the Title of each Emperor, from the reign of *Constantine*, down to his own time. This Emperor then compiled Sixteen Books, several Sentences of which are explained, others require no Exposition, 1 Book of Novells of the same Emperor *Theodosius*, another of the Emperor *Valentinian*, Son of *Placidia* ; 1 of *Martian* Emperor of the East, another of the Emperors *Anthony* and *Leo*, and 1 of the Emperor *Majorian*. But he takes no Notice either of the *Gregorian* or *Hermogenian* Codes, some fragments of which are annexed to the printed *Theodosian* Body.—*Sed quoniam quædam sunt in legibus Imperatorum obscura, ad plenum intellectum apposuimus libros Institutionum Gaii et Pauli Juris consultorum.* But, says he, inasmuch as some Things are obscure in the Laws of the Emperors, we have towards their being thoroughly understood, added the Institutions of the Lawyers *Gaius*, and *Paulus*—and having prefixed the first novel of *Theodosius*, which—*Epistolam Theodosii minoris vocat de confirmatione legum antiquarum*—he calls the Epistle of *Theodosius* the Younger, concerning the Confirmation of the antient Laws——He gives us the Books themselves, but they are so imperfect, that sometimes a whole Book has but a single Title, several Titles want many Laws, and we frequently meet with some Books, which have no Titles at all. Moreover the 1st Book in the printed Copies is entirely wanting.—The 2d is called the 1st.—and the rest afterwards accordingly. And altho' he

he makes mention of Sixteen Books, yet there are only Fifteen contained in his Works, and these, as we have observed, imperfect ——— The Institutions notwithstanding of *Gaius*, and *Paulus*, as well as the Novells of the succeeding Emperors, are by him, in such a Manner, handed down to us ; that several points, very corruptly read in the printed Editions, may, by the Help of his Writings, be, with the greatest Ease, truly restored to their genuine sense, But at the same time, that this Monk of *Malsbury* proposes thus to set forth the *Theodosian* Body of Laws, with the others already mentioned of a like nature ; He, as is plain from what we have already quoted from him, evidently speaks of the *Justinian* Body, as of Laws, not much unknown to himself, and his Countrymen. And it seems to me highly probable that the very same Persons, who brought at that time the *Justinian* Body into this Nation, introduced also with it, to the End we might have as complete Promptuaries of the *Roman* Law extant in *Latin*, as cou'd be procured, that very *Theodosian* Body, which *Malsburiensis* thus made Use of.

SECT.

S E C T. III.

Concerning the Introduction, about the Year 1140, of the *Justinian* Body into *England*, and of its being then illustrated with valuable Interpretations, and reduced into a Compendium, by that most excellent Lawyer, Master *Roger Vacarius*, who was the first most learned Professor of the Law among us. He was a Native of *Lombardy*, a *Benedictin* Monk, at first Prior, and afterwards Seventh Abbot of *Bec* in *Normandy*.

King *Stephen's* Edict, with Regard to him, and the Imperial Law, considered.

The Abbey of *Bec*, was at that Time a renowned Seminary of Learning.

JOANNES SARISBURIENSIS (a)
Bishop of *Chartres*, who flourished some-
L what

(a) *Sarisburiensis*, born at *Salisbury*, in the Year 1110. He was promoted to the Bishoprick of *Chartres*, in 1179. and dyed three Years after, being esteemed one of the most ingenious polite and learned men of that Age.

Collin.

what after the Monk of *Malmsbury*, having died in the Year of our Lord 1182, or in the Reign of *Henry* the 2d, furnishes us with a most exprefs Testimony, that the *Justinian*, called the *Roman* or *Italian* Body of Laws, under which Name the *Theodosian* was also included, were, in the Time of King *Stephen*, who began his reign in the year of our Lord 1136, and dyed in 1154, publicly brought hither; which coincides with the time that the emperor *Lotharius* founded public Lectures of them in *Bononia*, and spread them in some Measure, by his own example, throughout the western Parts of *Europe*. Here follow the words of *Sarisburyensis**—*Alios vidi, qui libros legis deputant igni, nec scindere verentur, si in manus eorum jura pervenirent, aut Canones. Tempore regis Stephani, a regno jussæ sunt leges Romanæ quas in Britanniam, Domus venerabilis, Patris Theobaldi Britanniarum Primatis, asciverat. Ne quis etiam Libros retineret Edicto regio prohibitum est, et Vacario nostro indictum Silentium; sed deo faciente, eo magis virtus legis invaluit quo eam amplius nitebatur impietas infirmare.* I have seen some, who, if either the Laws or the canons fall into their Hands, make no scruple of condemning them to the Flames, and tearing them in Pieces. The Imperial Laws, brought hither in the reign of King *Stephen* by the Household of the venerable Father *Theobald*, Primate of *Britain*, were prohibited in this Kingdom. It was also by a royal Edict decreed, that
 none

* Joan. Sarisburienf. Polycrat. l. 8. c. 22.

none should so much as keep by them the
aforesaid Books, and Silence was enjoyned
our *Vacarius* ; but proportionably as im-
piety strove to invalidate the Law, its
Power, by God's Blessing, gradually pre-
vailed. This same *Theobald*, who, as tis
said, was the first Archbishop of *Canter-*
bury honoured with the title* of *Legatus na-*
tus, which Pope *Innocent* the 2d conferred
on him, and which dignity was from that
time transmitted to his Successors, was, in
the year of our Lord 1139, about three
Years before the Death of the Monk of
Malmsbury, consecrated Prelate of *Canter-*
bury. He was, from being Abbot of *Bec*,
made Archbishop of that See, and went for
his *Pallium* to *Rome*, at which Place he
sometimes, as well as at *Rheims*, assisted at
Synods. What is here said of his House-
hold having brought the *Roman* Laws into
Britain, seems to be understood of the At-
endants, who accompanied him backward
and forward in his journies. They being
unwilling that England should be destitute
of those Laws, which at that time were in
so great repute abroad, on that account took
care to have Copies of them, brought over
hither ; and this, *Sarisburyensis* tells us, dis-
pleased the King to that Degree, that he
prohibited the reading them by a public
edict ; of which Matter we shall presently
treat more fully. But what is meant by
these words.——*Et Vacario nostro indic-*
tum Silentium.——And Silence was en-
joyned our *Vacarius*——for it must, tis

* Joscelyn. An-
tiq. Eccles. Brit
ten. p. 127 Ed. c
Hanoviae.

plain, be so read.—The just mentioned words occur in the antient Editions of the *Policraticum*, one of them published by *Constantinus Fradinus* the other by *Bertholdus Remboltus*, both dated the same Year and Month, to wit, in May 1513; tis read in the Edition of *Remboltus*.—*Et vicario nostro, &c.* In that of *Fradinus*—*Et Vacario*.——But there are three other Editions extant, two of them printed at *Leyden*, * the 3d contained in the Books called *Bibliotheca Patrum*, § or the Library of the Fathers in which the words—*Et Vacario*—are rightly retained, notwithstanding *al. Vacario*'s being added in the Margen, hereby insinuating that the reading was, in this Place, very doubtful, and that the Name was perhaps here to be understood of some Vicar of *Theobald's*, who read the *Roman* or *Imperial Laws*, and had been for that reason silenced: but 'tis evident that the Name *Vacarius* is, in this Passage, to be preserved, and that Master *Roger Vacarius*, called also *Wacarius*, a Native of *Lombardy* is thereby meant, who *Lethardus*, the 6th Abbot of *Bec*, or of the Monastery of *St. Mary le Bec Helloin* within the Diocess of *Rouen* in *Normandy*, subject at that time as well as long afterwards to *England*, and the immediate Successor of *Theobald* being dead) was chosen into his Place, and read in the Reign of King *Stephen*, consequently in the time of *Theobald*, by whom doubtless he was much valued, the *Imperial Laws*, out of the *Justinian Body*, to a great Number of Pupils in *England*. For thus, the

* *Policrat. Sars-*
bur Lugdunoba-
tavica Ed. 1595
& 1639.

* *Bibliothec. Pa-*
trum Edit. Co-
lon. 1622. tom.
** 5. p. 338.*

* *Vid. Claud.*
Robert. in Gal-
lia Christiana. F.
503.

Author * of the late Edition of the Chronicles of *Normandy*, from the Year of our Lord 1139, to the year 1238, published from the Manuscript in the Library of the Abbey of St. Victor, at *Paris*, expressly tells us under the Year 1148; but the Matter relates to the following Year or 1149, for says he, *Obiit Bechardus VI Abbas Becci cui successit Rogerlus Magister Wacarius gente Longobardus, vir honestus et Juris peritus, cum leges Romanas anno ab incarnatione Domini MCXLIX, in Anglia discipulis doceret et multi tum divites quam pauperes ad eum causa discendi confluerent. Bechardus* (plainly to ^{be} read *Lethardus*) the 6th Abbot of *Bec*, dyed; who was succeeded by Master *Roger Wacarius*, a native of *Lombardy*, a worthy Man, and learned in the Law, whilst in the Year of our Lord 1149 he was teaching the *Roman Laws* in *England*, and many both rich and poor, were flocking to him for the benefit of Learning

—— Tis in the Margin, by an unhappy and idle Conjecture, marked there.—*forte Baccalarius*— but tis from what has been quoted out of *Sarisburiensis*, fully confirmed, that it ought to be read *Wacarius*, or *Vacarius*; and he not only taught publicly; but at the Request of the Poorer sort, whose Purfes could not enable them conveniently to purchase the *Justinian Body*, as well as at the Desire of those, who were better pleased with a Compendium of the Law, abridged the *Pandects*, and *Code* (as

* In Scriptorib.
Norman. p. 983.

Raimundus afterwards composed his epitomy of the Canon Law, for the Use likewise, as he himself tells us, of the Poor) into nine Books, which might serve the studious instead of the most costly Promptuary of the Law.—The just abovementioned author, says the same thing concerning him, for immediately after what has been cited, he has these words — *Suggestione Pauperum, de Codice et Digesto exceptos IX. libros composuit qui sufficiunt ad omnes legum lites quæ in scholis frequentari solent decidendas, si quis eas perfecte noverit.*—He, at the request of the poor, compiled out of the Code and Digest nine Books, which are sufficient to enable one, who will make himself a perfect Master of them, to decide all Law debates, usually handled in the schools. *Roger Vacarius* at that Time publicly taught the *Justinian* Law here under King *Stephen*; in the 14th year of whose Reign, to wit, in the Year of our Lord 1149 He succeeded *Lethardus*, Abbot of *Bec*; and it appears plain, from its being expressly said in the above mentioned Chronicles, that he succeeded *Lethardus* Abbot of *Bec*, *cum doceret heic*—at the very time of his teaching here, and when many both Rich and Poor, were on that Account flocking to him, that he had thus for some Years before taught the *Justinian* Law. And tis highly probable that he also composed his Books here before he was made Abbot, that is whilst he was Prior of *Bec*; for it appears from a Manuscript

script *of Robert de Torrincio, (b) who was likewise Abbot of Bec, that he had been first a prior of that Abbey. And tis not indeed easily proved from the aforelaid Robert, that Vacarius, after his having been made Abbot of Bec, taught in this Nation. In the Year of our Lord 1149, says he, *Obiit sanctæ recordationis dominus Letardus VI. Abbas Beccensis Ecclesiæ: vitæ suæ cursum virgo Senex finivit VI nonas Julii, sabbato, infra Octavas Apostolorum Petri et Pauli.* Dyed Letardus, of blessed Memory, 6th Lord Abbot of the Abbey of Bec: This same chaste old Man, finished the Course of his Life on the Lord's Day, being the 6th of the Nones of July, within the Octave of the Apostles Peter and Paul— which Festival falls on the 29th of June, wherefore he departed this Life, on the 2d Day of July. The same Abbot says a little after. *Huic sancto viro successit Dominus Rogerius Prior secundus in utroque festamento apprime eruditus, nec non clericali et seculari scientia decenter ornatus et ab omni communiter congregatione electus in ipsis octavis videlicet Apostolorum Petri et Pauli qui benedictus apud Sanctum Wandregisilum in die festivitatis sancti Jacobi Apostoli a venera-*

L 5

bili

(b) Robert de Torrincio, who was likewise Abbot of Bec.

Du Monstier, who in his *Neustria pia* has given an Account of all the Abbots of Bec, does not rank him amongst them; but he had been Prior claustral of that Abby, and was afterwards made Abbot of Mount St. Michael, in Normandy. *Da Monstier's Neustria pia.* P. 388. See Note Robert Montensis, p. 156.

• Mss. Rob. d.
Torrincio in Bib-
liotheca V. Cl.
Simon. d'Ewes.
vid. Balzeum
Cent. 13. Scrip.
23.

bili Hugone, Rothomagensi Archiepiscopo, ab eodem coram Conventu Beccensi in Sede sua collocatus est, ex tunc super gregem sibi commissam pro posse sue die ac nocte decenter invigilans. Master Roger, the second Prior (*Lanfranc*, afterwards Archbishop of *Canterbury*, having been the first) succeeded this Holy Man—*Rogerus* was thoroughly learned in the Old and New Testament, and competently adorned both with ecclesiastical and civil Learning, and being unanimously elected by the whole Congregation on the aforesaid *Octave*, to Wit, of the Apostles *Peter* and *Paul* (that is on *Wednesday* the 6th day of *July*) he received the Abbatial Benediction in the Church of *St. Waudregisilus* on the Festival of *St. James* the Apostle (or on the 25th Day of *July*) from the venerable *Hugh* Archbishop of *Rouen*, and was by the same Archbishop installed in the Presence of the Abby of *Bec*. He from that Time watched in the most prudent manner, to the utmost of his power, Day and Night, over those committed to his Charge: Now *Roger* was in *England*, where he read Lectures on the Law, at the Time of his being elected by the Monks of *Bec*; from *England* he went into *Normandy*, where he was consecrated Abbot. And as he is said.—*die ac nocte extunc super gregem suum decenter invigilasse*—to have been from that time, in the most becoming Manner, both Day and Night vigilant over his Flock—it seems from thence plainly to follow, that he did not quit the sacred Duties annexed to his

his Office, to read in foreign parts Lectures on the Civil Law. But that he publicly taught it here before, as we have said, for some Years after the *Justinian* Law had been introduced into this Nation, must be owned sufficiently manifest. And tis to be observed, that, in those Ages, all Kind of Learning flourished in a very eminent Degree in the Abbey of *Bec*, which occasioned this same *Roger*, to be at last so distinguished among the learned. The said *Robert de Torrineio* tells us also, *Mortuus est etiam hoc anno Vir religiosus et Magnæ literaturæ Ivo Carnotensis Episcopus. Hic dum esset Juvenis audivit Lanfrancum Priorem Becci de secularibus et divinis literis tractantem, in illa famosa schola quam Becci tenuit, in qua multi et nobilitate seculari et honestate morum convenerunt; viri præditi, et qui postea ad summum apicem ecclesiasticæ dignitatis attigerunt*—That in the Year of our Lord 1117 dyed, *Ivo* bishop of *Chartre*, a religious and very learned man, who in his younger Days studied human and divine Learning under *Lanfranc*, prior of *Bec*, in his celebrated school of that Abby, to which the aforesaid persons who afterwards attained to the highest Dignities in the church, together with many of the laity of great Rank and Probity resorted.—And even whilst this our *Roger* governed the Abby of *Bec*, *duodecim Abbates ad regimen ecclesiarum inde assumpti sunt**—twelve Monks of the same Abby, were made Abbots over other Monasteries. And a great many were from that Abby, † it having

been₂₃.

* *Robert. Montensis in Append ad Sigibert. An. 1180.*

† *Vid Fæzum Cent, 13. Scrip*

been ever a most fruitful seminary, advanced to the Government of sacred affairs in England.—This *Roger Vacarius* was Abbot of *Bec* thirty Years or thereabouts, and dyed in the year of our Lord 1180, or about the latter end of the Reign of King *Henry* the 2d, having all along, with the greatest Honour, acquitted himself of the duties of that dignity.—*Nullus Prædecessorum suorum excepto Sancto Herluino primo Abbate tanta fecit in Becco Monasterio quanta Ipse.* None of his Predecessors, says *Robert (c) Montensis* (who enumerates the good services he had done for the Abby) except *St. Herluin*, its first Abbot, did so great Things in the Abby of *Bec*. *Vacarius* was succeeded in his Dignity by *Osborn* Prior of *Beaumont*, a Monk of the Abby.—But whether this *Roger* was at any time a professor or Reader of the Law, either at *Oxford*, *Cambridge*, *London*, or in the Palace of *Theobald* Archbishop of *Canterbury*, or in any other secular or regular Schools of this Nation; or whether he taught in any fixed Place, tho' this last seems most probable, does not appear.

S E C T.

(c) *Robert Montensis*, called so from his being Abbot of *Mount St. Michael* in *Normandy*. His Name was *Robert de Torigneyo*, and was from being Prior *Clanstra* of the Abbey of *Bec*, elected Abbot of *Mount St. Michael* July 22 1154. He wrote a Chronicle of the Abbey of *Bec*.

Du Monstier's Nenstria. 388.

See Note c. 7. f. 3. *Robert de Torrioneio*,

S E C T. IV.

Our Annals and Histories, make no Mention of that Matter. What Notice is taken of this *Roger Vacarius*, the first Professor of the *Justinian* Law in our Nation, in the Writings of our Civilians, and others.—*Placentinus* was a very great Enemy to him. *Vacarius* was, after the Death of *Thomas Becket*, elected to the Archiepiscopal See of *Canterbury*, and therein confirmed, but could by no Means be prevailed upon to consent to his Election.

BUT I could hitherto, neither in our Histories or Annals, find any mention of the Time the Imperial Laws were thus brought among us, or of *Roger Vacarius's* having been Professor of the Law in this Nation. *Ranulph Higden*, (a) tis certain, in that Part of the Preface to his *Polychronicon*,

(a) *Ranulph Higden*, a Monk of *St. Werburgis*, in *Chester*, where he dyed very aged, in 1377. *Rapin*.

nicon, where he Names the Historians as well as the other writers from whom he compiled his Work, not only takes particular Notice of *Joanes Sarisburiensis*, but also of that Author's Book called *Policraticum*, which contains, as has been before shewn, a most express and weighty Testimony, as well of the Imperial Laws being brought hither, as of this same *Roger Vacarius*. But the aforesaid *Ranulph* wholly passes by that Matter in Silence, of more Importance, with regard to the History of *England*, than any thing else treated of in that work. This *Roger* however is by other Authors plainly enough taken Notice of, it being evident, that this 7th Abbot of *Bec*, was, while Prior of that Abby, the first, who, after the Revival of the Imperial Law in the West as before set forth, publicly taught it in *England*; as *Placentinus* was, some Years after, * the first, who began to promote the Profession of the same Law, at *Montpelier* in *France*. This was the very *Rogerus*, who is, by some Writers, and in some Editions, recorded by the Name of *Veteris Glossatoris*—the ancient *Glossator*, sometimes also, by that of—*Summæ Juris primæ, Paratitlorum primi Authoris*—the first Author of the first Sum of the law and of the Paratitles—as well as by the Title of—*antiquæ ac immortalis Memorix Doctoris*—a Doctor of antient and immortal Memory. *Wolfgangus Freymonius* sets him down as the chief of the *Civilians* who, flourish'd between the 12th and 13th Centuries, but tis very evident, from what has been

* Valentin Forster. in Placentino. Joan. Fichardus, &c.

has been already said, that he dyed twenty Years before the 12th Century ; and that he was cotemporary with *Irnerius, Martinus, Bulgarus, Jacobus, Bandinus, Hugolinus, Pyleus, Otto, Placentinus*, and all the other restorers of the Imperial Law in the West ; that is down to the Reigns of the Emperor *Frederic Barborossa*, or of our Kings *Stephen* and *Henry* the 2d, or about the Middle of the 12th Century, and for some few Years longer. *Catellianus Cotta*, * says that—

* Catellian. Cotto. in lib. de juris perit.

Rogerus Odofredi beneventani Præceptor, qui primus paratitla conscripsit, id est rerum summas titulatim appositas quod a Justiniano permiffum fuerat. Roger, who first wrote the Paratitles, that is a Summary of the Matter drawn up under the respective titles, which had been allowed of by *Justinian*, † was Præceptor to *Odofredus* of *Beneventum*.

† C. Justin. tit de vet. jure nucleaud. L. 2, Sect. ult.

—but, in point of Chronology, it can scarce at all be believed, that our *Roger Vacarius* cou'd have been Tutor to *Odofredus*, this last having lived till the Year of our Lord 1265, || whereas it is certain, that *Roger* dyed, in the Year 1180, consequently eighty five Years before the Death of *Odofredus*. And *Odofredus* himself a thousand times acknowledges another Person for his Præceptor or Master, to wit *Jacobus Baldwinus* (from whom nevertheless he often differs) but he no where, that I remember, mentions *Rogerus*, whom he sometimes, though not often, cites, in that capacity. *Odofredus* very frequently speaks of the sums of *Joannes* and *Azo*, and now and then of *Placentinus's*. As for our *Rogerus*, he ranks him among the an-

|| Joan Fichardus vit. recent. Jurisconsult in Ochofredo. Guid. Pausirolus de clar. legum Interpret l. 2. c. 35.

* Odofred. ad L.
quod tempore C.
tit. de restitutione
Militum.

§ Placentin. in
Summæ initio.

† Odofred. ad L.
1. D. lib. 2. tit.
de transactioni-
bus.

tients, for he often calls those, who wrote before *Azo* and *Joannes*, antients, as he likewise stiles the Authors, who wrote after them. Moderns On the Law—*Eam quam C. tit de Fidei commissis.*—*Ro.* sometimes occurs in his Works for our *Roger*, and he elsewhere observes,* that—*In illis tribus quæstionibus fuit opinio domini Mar. Pla. Rog. et Fregerii et Domini Alberici antiqui Doctoris.*—with Regard to those three Questions, the Opinion of Master *Mar* (*Martinus*) *Pla.* (*Placentinus*) *Rog.* (*Rogerus*) and of *Fregerius*, and Master *Albericus*, an antient Doctor, was such. But I am strongly inclined to believe, that it ought to be read *Frogerii*, and that no other Person is meant by this Name, than *Rogerus*, and that *Frogerius*, as somewhat synonymous to *Rogerus*, was likewise called *Frogerius*, as he is expressly named so by *Placentinus*.§ And *Odofredus* himself designs him elsewhere under that Appellation. That Author speaking of what may be done, with Regard to a present, or future Law Suit, says—*Estne istud verum sive moveatur lis just sive injuste? Dixerunt quidam quod sic Et pro eis videtur facere C. e. 11. Dominus Frogerius in articulo isto contradixit. Et ita invenietis scriptum in Summa sua quam fecit super C. et fuit prima Summa quæcunque fuerit facta. Et tenet forte per XX cartas. Post eum fecit Dominus Placentinus suam. Post eum dominus Joannes Bafianus fecit suam quæ incipit Quicunq; vult. Et est nulla; et postea Dominus Azo fecit optimam summam qua hodie utimur.* †—Is that true, whether

the Suit be commenced justly or unjustly? Some are of opinion it is. And the Code. e. 11, seems to make for them. Master *Frogerius* is, in that Point of a contrary Opinion, and so you will find by the Sum he made upon the Code, which was the first sum ever publish'd, containing about twenty Sheets. Next Master *Placentinus* wrote his Sum, after him, Master *Joannes Bosianus* finished his, which begins with *Quicunq; vult*, and is in no esteem. Then Master *Azo* gave us that excellent Sum, which we now make Use of—Thus far *Odofredus*.—*Rogerus* therefore was the first Summulist, as *Irnerius* was the first Glossator. And *Antonius Augustinus*,* if I am not mistaken, attributes the Sum of the Canon Law to the same *Rogerus*, who also by *Fulvius Mariotellus** is expressly ranked among the few eminent interpreters of the Pandects, as well as he is by the antient Summulists by *Justinus Gobleus*.* His Name, tho' but very seldom mentioned by the Biographers of the Lives of the Lawyers, or elsewhere, is yet now and then met with in Commentators, where after the antient Manner of reading Abbreviations, we meet with *Roger*, that is this same *Roger* the Lawyer. But *Guido Pauzirolus** treats more largely and more expressly than any others concerning this Author—*Martini et Bulgari ætate clarescere Rogerius cæpit qui primus in eam Pandectarum partem quam Infortiatum vocant glossas emisit*.* *Cum enim publico stipendio non nisi Digestum vetus et Codicem antiqui Professores interpretari teneren-*

* Anton. Augustin. in præfat. de quinque vet. collectionibus.]

* Ful. Mariotellus in Neopædia, p. 164.

* Justin. Gobleus in Præfat. ad summ. Othonis

* Guid. Pauzirolus de clar. legum interpret. li. 2. c. 18.

* Odofred. in L. 1. ff. tit. soluta Matrimonio et in L. 7. Divortio in Princip. eodem.

tur, reliquas Legum partes negligentius tractabant, nec nisi privatim soluta stipe explicabant, et ob id extraordinarias eas lectiones vocabant. Sed Rogerius, ne hæc quoque legum pars obscura permaneret, in eam suas lucubrationes edidit. Primus etiam Juris compendium (quod summam vocant) viginti Chartarum numerum non excedens composuit. Hunc æmulatus Placentinus etiam longe luculentiorum summam emisit; tertiam sed inanem Joannes (Basilianus scilicet Azonis præceptor Cremonensis) fecit,* Postremo vero cæteris lompletiore condita omnes ante se Azo superavit. Rogerium alii corrupte Frigerium (lego Fregerium) nonnulli etiam Fridericum nominant.* Idem de diversis præscriptionibus forma Dialogi scripsit, in quo se cum Juris prudentia loquentem inducit, nulla ejus mortis aut Sepulchri Memoria habetur.— Rogerius, he tells us, who first published glosses upon that part of the Pandects, called *Infortiatum*, (that is the 24th and the following Books to the End of the 38th, those, which go before, being usually called by the Name of the old, the subsequent ones by that of the new Digest) began to flourish in the time of *Martinus et Bulgarus*. For whereas former Professors, not being obliged by the public Salary they received to interpret any other Laws, than those contained in the old digest and Code, handled the other Parts of the Law in a careless Manner; nor would explain them except in their private Expositions, and which from their being paid for, were called Extraordinary Lectures; our *Rogerius*, that*

* Odofred. in L. 1. ff. tit. de transactionibus.

* In Summa Azon. in Princip. trium. lib. Codicis.

* Gl. et Odofred in dict. L. 1. ff. tit. de transactionibus.

even this Part of the Laws might not remain obscure, published his Illustrations upon it. He was also the first, who composed a Compendium of the law (commonly in that Age called a *sum*) not containing above twenty sheets. *Placentinus* striving to outdo him, published another much more extensive *sum*. *Joannes*, to wit, *Basianus* of *Cremona*, Præceptor to *Azo*, made a third, which was but little regarded. But lastly *Azo*, having wrote one much more complete than the former *sums* excelled all the Authors of this kind before his Time. Some corruptly call this *Rogerus*, *Frigerius*, (read *Frogerius*) others also *Fridericus*. The same Writer published a Book in the Form of a Dialogue, concerning various Prescriptions, in which he personates one, reasoning with *Jurisprudentia*. — There is no Account extant, either of the Time of his Death or Place of burial. — Thus far *Pancirolus* concerning our *Rogerus*. But we have before shewn when he died. The Dialogue he mentions concerning Prescriptions, is contained in the 17th Tome of the Treatises of eminent Lawyers, among which also there is another small Treatise of his on the same subject, under this title, *Rogerii antiqui Glossatoris de diversis Præscriptionibus*.—A Tract of *Rogerus* the antient Glossator, concerning various Prescriptions.—These two small Books are likewise printed * with the Works of *Azo*, *Dinus*, and some other Authors, treating upon Prescriptions, in which he is stiled *Antiquus et immortalis*

* Lugduni. 1466

memoria Doctor Rogerius. — *Rogerus* the antient Doctor of immortal memory. The printed Book of *Rogerus* the Lawyer, who is the same with our Master *Vacarius*, is briefly mentioned by *Gesner* in his Library.

— This therefore was the very Person, to whom, as *Joannes Sarisburiensis* tells us, Silence was enjoined, to wit, that he should no longer read here, as he had begun to do, public Lectures on the Imperial Law. —

Now this Prohibition was issued out by King *Stephen*, about the fourteenth Year of his reign, which answers to the Year of Christ 1149, at which Time, it is plain, from what has been already proved, that he both publickly read and taught in *England*. And as *Irnerius* was the first Expounder at *Bononia*, or in *Italy*, of the Imperial Law, revived in the West; so *Roger Vacarius* was the first Expounder of it in *England*, as *Placentinus* likewise was at *Montpelier* in *France*, to wit, sixteen years, or thereabouts, after the Death of our *Rogerus*, that is, about the Year of our Lord 1196, at

* Vi. Guid. Pausirole. de clar. legum Intec. l. 3, c. 20.

which time—*Rogerii nominis abolendi * cupidus cique tenebras se offusurum jactans*—

He being ambitious of abolishing the Name of *Rogerus*, and boasting that he would involve him in perpetual obscurity, began to write at *Montpelier*. 'Tis certain, as hath been said, that *Placentinus* composed a Sum of the Code, which till the Publication of *Azo's*, was in greater esteem among the learned than any other: *Rogerus's* Sum, which I believe is not now any where to be found

found, being at last laid aside. *Placentinus* was also the Author of the three last Books of the Sum attributed to *Azo*; and *Placentinus*, who certainly greatly envied the glory of *Rogerus*, hints that his Sum was to be looked upon rather as an Essay, than as a finished work. One *Magister Vacarius* is likewise mentioned in a Rescript * of Pope *Alexander* the third, concerning a Marriage in the Diocese of York, and this Rescript is directed to him, and the Abbot of *Fountain*, and plainly coincides with the Time of *Rogerus*; but he, as hath been shewn, was made Abbot of *Bec* many Years before the aforesaid *Alexander* was Pope, wherefore 'tis scarce credible, that that Pope would have then called him simply by the Name of Master *Vacarius*, and not have given to him, as well as he did to the other Abbot, the Title of his Dignity. Perhaps, that Master *Vacarius* succeeded *Rogerus*, as Professor here of the Imperial Law. *Glosses* on Interpretations on some Books of the Cannon Law also, as on the Sum of *Bernardus Compostellanus*, are attributed, as it seems, to this our *Rogerus*; † but this is a manifest Error, occasioned by not knowing the time of his Death, he having departed this Life, as hath been shewn, long before, or in the Year of our Lord 1180. The singular Regard, and high Esteem also which was shewn to this eminent Person, may be learned both from his having been preferably to other Candidates of great Note, not only elected at *Lambeth*,

* Append. ad
Concil. Lateran.
sub Alex 3. pars.
5. tit. de sponsa-
tal. c. 13.

† Vid. Guid.
Pauziroli de clar
leg. Interpret. l.
3. c. 2.

by Odo the Prior, and his Monastery, but likewise from his Election having been, with the Consent of the Suffragans of *Canterbury*, confirmed by King *Henry* the 2d; as well as that he could by no Means be prevailed on to take upon him that important Charge, though he was most earnestly entreated to accept of it. *Gervase* of (a) *Canterbury* in his Chronicle, || mentions the Names of three Persons who were proposed as Candidates, (this also being required by the Imperial Law,) ‡ of whom this *Roger* was one. And then says he, *Prior cum quibusdam monachis affuit, et tandem Abbatem Beccensem solenniter elegit, consentientibus utcunque Episcopis (scilicet Richardus de Luci summus tunc Angliæ Jusficiarius, ut de Electione hac consulerent, Londinum Episcopos Angliæ congregarat) et assensu regio electione confirmata, singuli ad sua recesserunt. Et Prior Cantuariensis rediens ut suum electum adduceret in proximo transfretavit. Sed spe sua fraudatus est, quia prædictus electus nullius instantia induci potuit ad consentiendum. Institit autem Prior acriter per Regem et Legatos (Pontificis Romani; Albertum et Theodinum) qui adhuc erant cum Rege in Normannia vim electo inferre gestiens ut consentiret. Sed frustra. Nam cum instarent Rex et Legati simul cum Priore nec prævalerent, apud Sanctam Barbaram (in Episcopatu Lexovienfi) in Cæna*

|| Gervaf. Doro-
bern. Mss. Anno
1173. in Biblio-
theca Cottoniana

‡ Novell. Justin.
123 c. 1.
et Novell 137. c.
2.

(a) *Gervase* of *Canterbury*. He wrote a Chronicle of the Reigns of *Stephen*, *Henry* the 2d. and *Richard* the 1st.—*Rapin*.

Cæna Domini ab Electione est absolutus.

— The Prior being assembled with some of his Monks, *Roger*, Abbot of *Bec*, was at last solemnly elected, the Bishops (whom *Richard de Luci*, then high Justiciar of *England* had convened together at *London*, to consult about this Election) howsoever^(a) consenting, and the Election being by the Royal Assent confirmed, each returned to their respective Residences. The Prior of *Canterbury*, the Day after the Election, crossed the Sea, in order to accompany hither the Archbishop elect, but was disappointed in his Expectation ; for *Vacarius* could by no Means be prevailed on to consent to such Election. The Prior however the more strenuously insisted that he should accept of the Dignity, flattering himself that by making Use both of the King's Authority, and of the Power of *Albertus* and *Theodinus*, the Pope's Legates, at that Time with the King in *Normandy*, he should be able to induce him to consent to his Election. But all was to no Purpose ; for *Rogerus*, after that the King, Legates, and Prior, had jointly without Success pressed him to it, was absolved from his Election in the Church of *St. Barbara* (in the Diocese of *Lisieux*) on

M 3

Maundy

(a) *Howsoever consenting.* The Prior and Monks of *Canterbury* had strenuously insisted on (what they called) a free Election,) exclusive of the Bishops of the Province ; but at last they pitched upon three unexceptionable Persons, whom they recommended to *Richard de Lucy*, in order to the admission of some one of them, by the Bishops and King's Approbation. *Carr's Hist. Eng. v. 1. p. 654.*

Maunday Thursday. *Florilegus* (a) likewise tells us, that Anno M.C.L.XXIII. *Rogerus Abbas Beccensis Electus est in Archiepiscopum Cantuariensem. Sed Abbas nimis Religiosus penitus contradixit*—Roger Abbot of Bec was, in the Year of our Lord 1173, elected Arch Bishop of Canterbury, but the Abbot, being over scrupulous, wholly refused that Dignity.—*Rob. * Montensis* says this of him.—*Ille vero pretendens infirmitatem suam noluit acquiescere electioni eorum*—But he excused himself from acquiescing in their Election, on Account of his Infirmary.—*Ralph (b) de Diceto †* likewise informs us, that VI. Non. martii suffraganei Cantuariensis Ecclesie ut de Archiepiscopi electione tractarent sub edicto vocati venerunt Lamebedam; et quoniam Lanfrancus, Anselmus, Theobaldus in ea sede tam late floruerant, id idem fortune loci quodam modo deputantes, in Rogerium Beccensem Abbatem, (nam trini illi etiam fuerant Beccenses) si non unanimiter saltem voce tenus concorditer convenerunt. Orta est tunc primum Controversia, quis electionem pronuntiaret in publico. Suffraganeis hoc adjus Episcopi Londoniensis ab antiquo pertinere dicentibus Cantuariensibus e contrario Monachis asserentibus Priorem suum hac in re potius præferendum. Pro bono

* Robt. montensis, Anno 1174.

† Ra. de Diceto Mss. in Bibliotheca Cottoniana

(a) *Florilegus*, stiled so from his being a choice Collector of the Flowers of former Historians, but more commonly known by the Name of *Matthew of Westminster*. He ended his History at the Year 1307. *Rapin.*

(b) *Ralph de Diceto* Dean of St. Pauls in London. He wrote about the Year 1210. His *Abbreviationes Chroniconum*, contains an Abstract of our History down to the Conquest; and his *Imagines Historiarum*, gives the Pourtraictures of some of our Kings more at length, ending with the first Years of King *John's* Reign. *Rapin.*

itaque Pacis, ne quid in absentia Regis ori-
retur discidii, salvo jure partium, Ricardus & F. Auditoria
Pictavenfis Archidiaconus in omnium & ad-
jutorio recitavit. Abbas electus hoc intel-
ligens in Normannia coram Rege in præsentia
Cardinalium Alberti et Theodoni, electioni
factæ sicut diximus, penitus contradixit. Hoc
cum fecisse religionis obtentu suspicabantur
nonnulli. Ab aliis dicebatur quod Spiritus
pusillanimitate contractus se imparem oneri tan-
to protestatus sit. — The Suffragans of the
archiepiscopal See of Canterbury, pursuant
to an Edict issued out to convene them to-
gether, assembled at Lambeth on the 6th
of the Nones of *March*, in the Year of our
Lord 1173, to consult about the Election
of an Arch Bishop for that See. And *Lan-*
franc, *Anselm*, and *Theobald*, having been
highly eminent in this See, which Event the
Suffragans in some measure attributing to
the good Fortnne of the Abby of *Bec*, they
agreed to chuse *Roger* the then Abbot there,
(the three before mentioned prelates hav-
ing been likewise Abbots of the same Place)
and whether the Electors were heartily
unanimous or not; they all however consen-
ted to give him their Votes. It was then
that a Dispute, for the first Time, arose con-
cerning the Person who should publicly
declare the aforesaid Election. The Suffra-
gans affirming that this Privilege antiently
appertained to the Bishop of *London* (who
by our antient Law was Dean to the Arch-
Bishop of *Canterbury* in his College of Bi-
shops, or Body of Suffragans, as *Winchester*

* Lindwood ad
Constit. Pro-
vinc. tit. de Pa-
nis C. æternæ.
verb. tanquam.

was his Chancellor, *Lincoln* his Vice Chan-
cellor, *Salisbury* his Precentor, *Worcester*
his Chaplain, *Rochester* his Cross-bearer,) *
the Monks of *Canterbury* on the contrary
asserting, that the Preference in that Point
was due to their Prior; wherefore for Peace
Sake, and to prevent any troubles arising,
during the King's Absence, the Right of
all Parties being saved, *Richard* Arch-dea-
con of *Poitiers*, in the public Auditory,
declared his Election. The Abbot thus e-
lected, being made acquainted with it in
Normandy, intirely, as we have said, de-
clined before the King, in the Presence of
the Cardinals *Albertus* and *Theodonus*, such
his Election. — Some think, that he did
this out of a Pretence of Piety. others were
of Opinion, that he declared himself unfit,
by Reason of his Pusillanimity, for so great
a Burthen. Others again, as *Roger Wendover* (b) and *Matthew Paris*, (c) that *Electioni
factæ penitus contradixit, utrum pusillanimi-
tatis intuitu an Religionis incertum est.* —
He wholly declined his Election, but whe-
ther

[b] *Roger de Wendover*. The former Part of the History
which goes under the Name of *Matthew Paris*, to the Year
1235, is supposed to have been written by this *Roger Wen-
dover* who was Prior of *Bealvoir*: *Blakston's* Introduction to
his History of *Mag. Chart.* p. 5. *Rapin.* 80 Ed. V. 3.
P. 531.

(c) *Matthew Paris*, a Monk of *St. Albans*, one of the
most renowned Historians of this Kingdom. His *Historia
Major* contains the Annals at large of eight of our Kings
from *William* the Conqueror to *Henry* the 3d. *Rapin.*

ther thro' a Consciousness of Pusillanimity, or out of a motive of Religion, is uncertain. But he is, in the printed Editions of the Works of these Authors, as well as by the Biographers of the Arch Bishops, corruptly called *Robert*.

S E C T. V.

A Conjecture, or Surmise rather, concerning the Name of *Vacarius* in that Age.

WE shall now give our Opinion why and how it happened, that the Name of *Vacarius* was given to either of the afore-said Persons; for 'tis plain, *Vacarius*, and not as 'tis in the afore-said Chronicles, *Wacarius*, much less *Vicarius*, as *Sarisburiensis* has it, is the true Reading. For he certainly could not, with any Propriety, have been well called *Rogerus Magister Vacarius* — *Roger Master Vacarius* — but either, *Rogerus Vacarius Magister* — *Roger Vacarius* the Master, or — *Magister Rogerus Vacarius*, Master *Roger Vacarius* — had that been the Sirname of his Family, or substituted in its Place; but such Forms of Speech were, I own, in those Ages, as they are but too much now, in the highest Degree ambiguous. And for my Part, I'm of Opinion, that the Name *Vacarius*, ought
both

both there, and in the Rescript of Pope *Alexander* the 3d. to the Abbot of *Fountains*, and one *M. Vacarius* to stand for an appellative Name, by which the peculiar office he had taken upon him to set a part a Time, namely a Vacation, both for his Lectures on, and for his public Teaching of the Law, might be signified; by which Name others also were perhaps in that Age called. As it was common with the Antients to make Use of *Armis*, *Choreis*, *Philosophiæ*, *Postulationibus vacare*, to signify their employing themselves with more Earnestness to those things than any other: so *lectioni vacare et professioni*—to set aside a Vacation, in order to exhibit Lectures on, or profess any Science, was, in the Age we now speak of, the usual Language. *Joannes Januensis* in his *Catholicon* says; *Vaco, esse vel fieri vacuum. Et licet videtur ad alias significationes transferri tamen omnes redolent illam. Dicitur etiam vaco lectioni et operam do. Et vaco a lectione id est de deficio a lectione. Vaco nummis id est carco. Sed istæ omnes significationes redolent primam. Cum vero dico, vaco lectioni idem est ac si diceretur vaco ab alijs rebus et insisto lectioni, unde vacat impersonale, id est esse vacuum, vel licitum esse vel opportunum. Unde vacat mihi legere, opportunitatem legendi habeo et non impediatur ab alio negotio.—* That *vaco* signifies to be, or to become vacant, or void, and though it seems to be applyed to other Significations, yet all of them retain some Tincture of this their original

original. 'Tis also said, I set a Time apart and apply myself to Reading, that is, I make a Vacation for that Purpose, and I desist, or have a Vacation from Reading, which is the same as to say, I have laid reading aside. I am vacuated of Money, that is, I want Money. But all these Significations have some Relation to their primitive one. But when I say, I set a Part, a time, or make a Vacation in order to read, 'tis the same as if I had said, I vacuate or free myself from all other Business, and apply myself to reading, whence the impersonal Verb *vacat* signifies to be disengaged from any thing, that is, to be free, or at Liberty, or that it is lawful and proper to apply oneself to any Affair; whence to have a Vacation or time to read, means that one has leisure to read, and is not hindered by any other Business. *Hugh Pisanus*,* in his Work concerning the derivation of Words, uses almost the same terms.—Certainly as from *aquari*, *arbitrari*, *parare* (in the sense that *parare et comparare*, stand for § *inter se convenire*) the words *aquarius*, *arbitrarius*, *pararius*, and other such like, are by the Antients, according to the same rule, justly applied to signify different things, bearing some Proportion to the Primitive Words; so perhaps the daring Barbarism of the Moderns, not without being grounded on the Examples and Analogy of the Antients, formed according to the Sense we have mentioned. *Vacarius a vaco*, thereby particularly distinguishing him, who, above all others, dili-

* Hugo. Pisan.
M/s in Biblio-
thec. Lamb. ha-
na.

§ Vid. Annota-
tion. in Festi
Pappi.

diligently applied himself to, or set a time or Vacation a Part, for making Lectures, as undoubtedly our *Rogerus* did. Certainly *Vacarius*, may thus with less impropriety be derived from *Vaco*, than *Accursius* from *Accurro*. Now even *Accursius* himself, ‡ by every one stiled the idol of the Lawyers, on the Words of *Caius* upon the Law, concerning the Conditions of an Heir's taking upon him the name of another, which must be understood to extend only to reputable, not to infamous or base names, says thus, *Instituo te hæredem si imponas tibi nomen meum scilicet Accursium, quod est honestum nomen dictum quia accurrit et succurrit contra tenebras juris civilis. Secus si dixi si imponas tibi nomen Vespillo quod est turpe nomen.* I appoint you my Heir, on condition you take upon you my Name, to wit, *Accursius*, which is allowed to be a Name free from any Imputation of Infamy, because he that bears it, is assiduous to prevent, and remedy the darkness hanging over the civil Law; on the contrary should I say, if you consent to take upon you the Name of *Vespillo*; that being an infamous Name. And it is not much to be wondered at, that in those Ages, such Compositions or Derivations of Names were frequent, since we even meet with authors, who doubt † whether *Justinian* himself was so called from Justice, or from his having been the Son of *Justin*, whose Nephew indeed he was by the sister's side, his Son only by Adoption. And they, in order to confirm

‡ Accurs. Gl.
ad L. 63. D. tit.
ad Seratus Con-
sult. Trebellia-
S. Si in danda li-
tera. f.

† Odofred. in
Præfat. Cod.
Alia rjufmodi in
tit de Emendat.
Codicia.

‡ Inst. Instit.
tit. de Donatio-
nibus S. Est et
aliud.

§ Novell. Theo-
dos. tit. 14. l. 4.

confirm such trifling conceits, apply the following words of *Justinian* §—*consequentia nomina rebus esse studentes*.—We endeavouring that Names shall flow from the Things themselves—whence also they tell us, tho' very ridiculously, that he was called *Flavus* (instead of *Flavius*) *quia taliferat coloris*. From his being of a Yellow Complexion. But indeed in the printed Novells ‡ of *Theodosius*, almost the same Word as *Vacarius*, to wit, *Vecarius* occurs. *Et apud illustrissimas Præfecturas*, so tis there, *et apud Vecariis Rectores Provinciarum de quolibet negotio pulsari*, &c. But this, besides many more of the like nature in the aforesaid printed Copies, is a most gross Error. It ought, instead of *Vecariis*, to be read *Viros Clarissimos*, (or *Vi. Clariss.* whence *Vecariis* is in that Place, without any Ground, formed) *Rectors*, &c. This is evident from the above cited Manuscripts of the Miscellaneous Law Collections of *William of Malmesbury*, now in my Possession.

S E C T. VI.

What engaged King *Stephen* to publish the aforefaid Ediſt, which was either ſpeedily revoked, or came to nothing. The Monks were about the ſame time, by a Pontifical and Synodical Interdiſt, prohibited to teach the Civil or Imperial Laws out of the Limits of their own Monafteries.

IT is not very ſurprizing, that King *Stephen* ſhould at that time by an Ediſt prohibit both the Uſe of the *Roman* Laws, and of the Books, wherein they were contained; brought, in the Manner we have related, into *England* by the Domeſtics or Attendants of *Theobald* Archbiſhop of *Canterbury*, and doubtleſs under his Protection; ſince the King was then in the higheſt Degree enraged againſt him and had proſcribed him for going, † without his Leave, to the Council of *Rheims*; (b) though the Arch-

† Joſcelin in vita *Theobaldi*.
acc.

(b) *Rheims*. This general Council was called by Pope *Eugenius* the 3d, in the Year 1148, and the Biſhop of *Wincheſter*, craftily contrived that *Theobald* ſhould be ſummoned to it, in order that he might incur the Diſpleaſure, either of the Pope or King *Stephen*.

Parker Hiſt. de Antiquit. Britan. Eccleſ. p. 127 Binn. Concil. General. Tom 8. p. 616.

Archbishop was not behind hand with the King, for he in his turn had taken upon him to interdict the Kingdom. And it can scarce be doubted, but that *Henry*, then Bishop of Winchester, who was in the highest Favour with the King, and always endeavoured, with his utmost Might, to oppose (b) *Theobald* in his Designs, heartily joined the King in this Affair, to wit, That the Public Lectures of the Imperial Law, and the Books of *Justinian*, of which *Theobald's* Household, were the first Promoters here, and from thence began to make a considerable Figure, might be discountenanced, and the Use of them prohibited. *Roger Bacon*, § (c) that most celebrated Philosopher and Mathematician of the *Franciscan* Order, who wrote under *Edward* the First, mentions likewise

§ *Roger Bacon*. in compend. theol. seu opere minori Mss. in Bibliotheca Cottoniana.

(b) *To oppose Theobald.* One great Source of the Enmity between these two Prelates, was the Legateship. — On the Death of *William* Archbishop of *Canterbury*, Predecessor of *Theobald*, *Henry* Bishop of *Winchester*, the King's Brother, had obtained from Pope *Innocence* the 2d a Grant of of this Dignity, and for some Years exercised his Legatine Power by calling Synods, &c. to the Prejudice of *Theobald* who was then Archbishop of *Canterbury*, and who, as Primate of the Church of *England*, looked upon himself as the natural legate of the Pope. However Pope *Innocent* dying the 24th of Sept. 1142, *Theobald* prevailed on his Successor *Celestine* the 2d not to renew *Henry's* Power, but to confer the Post of Legate on himself.

Parker. — *Cart's Hist. Eng. v. 1. p. 645.*

(c) *Roger Bacon*, a learned *Eng.* Monk of the *Franciscan* Order. He was born, near *Ilchester* in *Somersetshire*, in the Year 1214, and was descended of a very antient and honourable Family. He was a Prodigy of Learning, and dyed about the Year 1292.

likewise this prohibitorial Edict.—*Rex quidem Stephanus allatis legibus Italiae in Angliam publico Edicto prohibuit ne ab aliquo retinerentur.*—King Stephen, indeed, says he, by a Public Edict, forbid any one to retain the Laws brought from *Italy* into *England*; But *Theobald* being afterwards reinstated in the Kings good Graces, and this Matter as is not uncommon, undergoing a second Consideration, that Edict, having been either revoked, or having fallen to nothing, proved of no Effect; wherefore, notwithstanding that Edict, the *Justinian Books* were retained; Lectures, and a public Profession of the Imperial Law allowed of: which, the same *Joannes Sarisburinsis* above mentioned, who flourished at the very Time when Silence was enjoined the aforesaid *Roger Vacarius*, the first public Professor of the Imperial Laws here, expressly takes Notice of. For he immediately adds †—*Sed Deo faciente, eo magis Virtus legis invaluit, quo eam amplius nitebatur Impietas infirmare.*—But the more Impiety endeavoured to invadilate the Law, the more, through divine Assistance, its power prevailed.

† Polieratic. lib.
3. cap. 22.

S E C T. VII.

Concerning the *English* Lawyers in
that and the preceding Ages.

Persons skilled likewise in other Branches of Literature in the preceding Ages, applied themselves in earnest to the Study of the Laws and antient Customs of *England*, as far as they related to it's public and civil Government; and the Lawyers and Judges of the Courts, were chosen out of this Number. And these, according to the difference of their Education, Quality, Dignity, and Conveniencies, lived either in Monasteries, Academies, the Families of the more eminent Bishops, in Colleges, or elsewhere. Now they made no public Use, in this Nation, either of the *Justinian*, or *Theodosian* Bodies of Law, but only followed the Customs of their Ancestors, and the Law of their Country, which before was, and down to our own times, still continues to be called the Common Law of England, which was in the time of the *Anglo-saxons* called, *publique*, secular or mundane Law, in Contradistinction to *Gouvernement*, or the sacred Law, as may be plainly seen in the Laws of the *Anglo-saxons*, That is to say, they made Use both in their Studies, and in the Courts of such Decisions only as were settled before their Time,

N

not

not unlike those we find in the Annals of the Law received at present among us; and they relied only on the Grounds of such Decisions, on their mutual Analogy, and on the Laws which were, as the Nature of Things required, variously renewed and changed. Of this kind, were those three *English* Lawyers, who flourished under the reign of *William* the first, that is, about the Year of our Lord 1070, long before the *Roman* Laws were introduced hither, to wit, the Monks *Sacculus*, and *Godricus*, and *Alfwinus*, Rector of the Church of *Sutton* whom we find, by an antient Register * of this Monastery of *Abingdon*, to have been—*legibus patriæ optimè institutos*—thoroughly acquainted with the Laws of their Country, in which we read also—*eis tantum secularium facuudiam et præteritorum Memoriam even-torum insuisset cæteri circumquaq; facile, eorum sententiam ratam fuisse, quum edicerent, approbarent. Sed et alii plures de anglis Causidicis per id tempus in Abbatia ista habebantur quorum collationi nemo sapiens refraga batur, quibus rem Ecclesiæ publicam tuentibus, ejus oblocutiones elingues fiebant.*——that they delivered themselves with so much Grace on secular Affairs, and had treasured up in their Memory, the Knowledge of so many former determined Cases (plainly intimating, that they were thoroughly versed in what we now call the Annals of the Law) that every body, as soon as they were made acquainted with their Determination, readily acquiesced in it. There were likewise about that
Time

* Mss. in Bibliotheca Cottoniana. 121.

Time (as we read in the same Register) many other *English* Lawyers in the afore-said Abby, whose Counsel were approved of by all wise Men, and the Detractors of the Church, whenever these Lawyers undertook the Defence of its public Affairs, were always put to Silence.— And †*William* the first, 'tis said, in the fourth Year of his Reign, to have summoned to London from all the counties of *England* — *Anglos nobiles sapientes et Lege sua eruditos, ut eorum et Jura et Consuetudines ab ipsis audiret*—His *English* Nobles, Wisemen, and learned in his Law, that they might inform him of their Laws and Customs. And our lawyers, as well before as after, down to the Time of the Imperial Laws having been in some Sort admitted both into the public Places of Study, and into the Courts, were not primarily trained up in the Knowledge of any other Law, (unless perhaps we except some Heads of the Pontifical Law in daily Use) than that of their own Country—*Ranulphus*(a) * *invictus Causidicus*—*Ranulph*, that unvanquished Lawyer, High Justiciary to King *William* the 2d, in whose reign the Clergy, for the most Part, filled up the Places of the learned, even with regard to the *English* Laws, to which they closely applied themselves, was of this kind. *William* of *Malmsbury* also plainly intimates as much, where he tells us, that in the Reign of the same King *William* — *Nullus Cle-*

† Rog. de Ho-
veden. part. post
fol. 347. edit.
Lon. Francofurt
631. et seq. in
608. Idem ip-
som in cod. Lich-
feidenf. Mss. in
Bibliothec. Coe-
toniana.

* Guil. Malme-
sbury. de Gest. re-
um. l. 4. p. 123.
edit. Francofurt.

N 2

ricus

(a) *Ranulph*, i. e. *Ranulph Flambard* Bishop of *Durham*,
Cart. Hist. 1. b. p. 456.

ricus nisi Causidicus—Clerks were all Lawyers. — And about the same time that the Imperial Law thus began to be received here, as well as in other Parts. — *Aubery de Ver*, Earl of *Guisnes*, chief Justiciary under (b) King *Stephen*, was, tis evident, in a high degree, eminently learned, and thoroughly versed in the Knowledge of our antient and common Law, without the least composition of the imperial Law. This is the very Person, called by *William* of *Malmsbury*,* *Albericus de Ver*, *Homo causarum varietatibus exercitatus*—*Aubery de Ver*, one thoroughly versed in a Variety of Causes; the same is affirmed of him by *Roger Wendover*, *Matthew* of *Paris*, and *Matthew* of *Westminster*, who moreover style him, as he really was, *Comitem Albericum de Ver*—Earl *Aubery de Ver*, he being at that Time, (c) Earl of *Guisnes* in *Normandy*. *Aubery de Vere*,

* Hist. Novell.
l. 2. an. 1139.

(b) King *Stephen*. It appears from *Dugdale*, that he was also Chief Justiciary, in the latter Ends of the Reign of *Hen. 1st.*
Dug. Chron. Ser. p. 2.

(c) Earl of *Guisnes*. He was Son of *Aubery de Vere*, who came over with *William the Conqueror*. He was not only chief Justiciary, but was also made by King *Henry*, Chamberlain of England. He conducted the Defence of King *Stephen*, who had been summoned by his Brother *Henry* Bishop of *Winchester*, the Pope's Legate, to appear at a Synod at *Winchester*, for having imprisoned several of the Bishops and dispossessed them of their fortified Castles; and told the Legate, that the Bishops had been punished, not as Prelates, but as the Kings Subjects and Servants. He was killed the next Year 1140, in a popular Tumult at London, being the 5th of the said King's Reign.

Morant's Hist. Essex, p. 292. Rapin.

Vere, Son of the aforesaid Earl, who was killed in a seditious Tumult at London, was created by the Empress *Matilda*, as well as by her Son King *Henry* the second, the first Earl of Oxford, from whom, by the Male Line, *Aubery de Vere*, Son of *Robert*, the late Earl, a most noble Youth, the twentieth Earl of *Oxford*, derives at this Time the same Name and Title. But as *Roger* the Monk and Prior of *Bec*, read, as we have shewn, publick Lectures here, so it was likewise at that Time customary for other Monks, as well out of, as within their Monasteries, to apply themselves both in the Courts and Schools, to the Study of the Imperial and *English* Laws; which Custom indeed greatly prevailed, even some Ages before *Rogerus*, as well as for a short Time after he had been Professor, in this Nation. But it must be likewise confessed, that the aforesaid Custom, about fourteen Years after he had finished his Lectures here, as far as relates to the Reading of Lectures out of Monasteries, either plainly ceased, or ought so to have done, in Obedience to the Pontifical Law: Pope

Alexander the third, having in the Year of our Lord 1164, decreed in a Synod held at *Tours*—*ut nullus * omnino post votum Religionis, post factam in loco aliquo professionem, ad Physicam Legesve Mundanas legendas permittatur exire. Si vero exierit, et ad Claustrum suum infra spatium duorum Mensium non redierit sicut excommunicatus ab omnibus evitetur, et in nulla Causa. si patrocinium*

* Apud. Goll.
Nurigeuf. J. 2
c. 15.
Et in Concil.
Tom. 3. par. 2.
2. v. 534. edit.
1713.
Anti. Collect. 1.
l. 3. tit. 3. c. 7
2.
Append. ad Con-
cil. Lateran. 3.
p. 27. c. 2.

præstare voluerit, audiatur. Reversus autem in Choro, Capitulo, Mensa etcæteris, ultimus Fratrum exeat. et (nisi forte ex Misericordia apostolicæ Sedis) totius promotionis spem amittat. Episcopi vero, Abbates, Priores, tantæ enormitati consentientes et non corrigentes spoliuntur propriis, honoribus; et ab Ecclesiæ liminibus arceantur.—That no Person whatsoever, after he had taken the Vow, or been admitted to a Profession in a religious Order, should be allowed to teach, either Physic, or the Civil Law, out of his Monastery; but if he shall leave his Convent, and not return to it within two Months, let him, as an excommunicated Person, be avoided by all the faithful, and is by no Means, should he attempt to defend any Cause, to be heard, and on his Return, he is, both in the Choir, Chapter, Refectory, and all other conventual Offices, to take the last Place after all the Brethren; and let such a one, unless perhaps he (thro' the Mercy of the Apostolic See) be dispensed with, be doomed to lose all Hopes of Promotion; and let the Bishops, Abbots or Priors, who connive at, and do not punish so great an Enormity, be deprived of their respective Honours, and forbidden Entrance into the Church. Pope *Honorius* the third,|| likewise afterwards confirmed the same Constitution, and this very Canon of the aforesaid Council of *Tours*, is inserted in the *Gregorian* Body ‡ of Decretals, And it may

|| *Compilat. Decretal. l. 5. tit. 27.*

‡ *C. Gregorion. Extra tit. Ne. Clerici vel Monachi secular. Regulis &c. c. 5.*

may from hence be plainly concluded, that it was before that Time customary with other Monks, as well as with our *Roger* Monk of *Bec*, to make public Lectures on, and to teach the Imperial and other Laws, both out of and within their Monasteries, and that they afterwards also taught the same Laws within their own Precincts.

CHAPTER VIII.

SECTION I.

What Use our Ancestors made of the *Justinian* Body of Law, from King *Stephen* (in whose Time it was first brought hither) inclusive of the Reigns of *Henry* the second, *Richard* the first, and *John*, Kings of *England*.

THE Public Use, such as it was, of the *Justinian* Laws, bore a Sway here from the time, as we have before observed, of their being first brought and read in *England*, in the Method of Study, in the Practice and Determinations of the Courts, and in giving Opinions. Neither was the Edict of King *Stephen*, as hath been from *Sarisburyensis* before noticed, any obstacle thereunto. The aforesaid King *Stephen* dying soon afterwards, his Successor King *Henry* the second, so effectually forwarded the Views of Arch-Bishop *Theobald*,
and

and those under him, that from that Time, those very-Laws were, with more Safety, cherished here, and held, at least by some, in much greater Esteem than before. There are, with regard to this matter, very remarkable Specimens extant, both in the above *Joannes Sarisburiensis*, who, being greatly careffed by *Theobald*, was on that Account a very leading Person in his Household, which had thus first introduced the Imperial Laws into *England*, and in *Petrus Blefensis*, (d) his Disciple, Arch-Deacon of *Bath*, and Chancellor of *Canterbury*. The aforesaid *Sarisburiensis*, in several Places of his *Policraticum*, * produces out of the *Justinian* Body of Law, many Testimonies relating to this Subject, and cites them, as if they were at that Time in Force here, or at least as if he looked upon them in that light, and that the very Royal Law likewise, which we have before treated of, was then common in the Mouths of our Countrymen. The same Author, in an Epistle of his to an anonymous Person, § though its manifest it was to some *Englist* Prelate, consequently relating to some Affairs of the

Eng-

* Joan Sarisbu.
Poliorat l. 4. c.
2. c. 6. l. 5. c.
13. 14. 15. 16.
i. 7. c. 20.

§ Joan. Saris. Ep
68.

(d) *Peter Blefensis* (*Blois* in the Diocess of *Chartres*) Arch-deacon of *Bath*, was one of the most learned Men of the 12th Century, insomuch that he was highly esteemed by the greatest Princes and Prelates of his time, and was made Preceptor to *William* 2d King of Sicily. Afterwards *Henry* the 2d King of *England*, kept him almost always at his Court. He continued *Iugulfus's* History to the Year 1117, the 17 Hen. 1.

He wrote the Life of *Hen.* the 2d, but it's not known what is become of it, and dyed at *Bath* about the Year 1204.

Collyer. Wheare. Tanner. Nicolson.

English Nation,) as plainly appears from the Mention made in that Letter of the Church of Lincoln) has these Words——*ea cautelâ diligentiâ versare in talibus, ut videri non possis sitire pecuniam delinquentium, sed quod Pastorem decet, quærere Salutem Animarum. Nosti siquidem quod et Seculi Leges eos acerbissime puniunt lege Julia Repetundarum, qui in faciendis ex officio § et non faciendis sordidum sectantur lucrum.*—You must proceed in Affairs of this Nature, to wit, in the Exercise of the Ecclesiastical Jurisdiction, with that cautious Diligence, that it may appear you no way covet the Money of the Delinquents, but that you rather aim, as becomes a Pastor, at the Salvation of their Souls; for you know that even according to the very civil Law, those, who in the Execution of their Office, perform, or omit any Duty for the Sake of filthy Lucre, are to be, by the *Julian* Law relating to Bribery, severely punished. This Author in the above Place, as well as in his *Policraticum*,† points at the *Lex Julia repetundarum*—the *Julian* Law concerning Bribery—that being, both in the Digest and Code, the very Title of that Law—as of a Law, which he judged to be one of those at that time received in some Measure by the English. And he elsewhere says, that *nec jura civilia nec Leges*, neither the Civil Laws, nor those of the Realm, decree Children unlawfully begotten, to be upon an equal Footing with such as are born in Wedlock; this he tells us* in his Epistle to Pope *Alexander* the Third, in which

† Joan. Sarisbur.
Policrat. l. 5. c.
16.

* Jo. Saris, Ep.
89.

which he gives him an Account of a Cause, which had been debated both before him, as a Judge delegated here, as well as in the King's Court, between *Richard de Anstey*, Nephew, by the Sister's Side, of *William de Sackville*; and *Mabilia de Frevill* her Daughter, concerning the Succession to the Goods of the deceased *William*. The question was, concerning the Birth of *Mabilia*, whether it was spurious or legitimate. The Matter was, according to Custom, referred by the Judges of the King's Court, to the Examination of the Ordinary, but upon entering on the Examination and Discussion of this Matter, *Legum Principum et Civilium*, The Laws of Princes, and the civil as well as the canon Laws, were consulted, and the joint Authority.—*Legum et Canonum*—of Laws and Canons, was equally produced; by the Former of which Laws the Imperial are manifestly understood,—*Mabilia's* Advocate also then present, endeavouring to maintain her Cause, both from her Parent's ignorance of the Law, and from the great length of Time, they had been married, produces, as a Precedent of great Authority towards determining the Point then before the Court, a Rescript of the two Imperial Brothers, concerning the incestuous Marriage of *Flavia Tertulla*, contracted through ignorance of the Law, and which had subsisted, without being called in Question, a great many Years; but I have never yet met with, either among the *Justinian* Laws, or
any

* Cujac. Obser-
l. i. c. i. Frey-
mon. in Symp-
tro Juris.

any where else, that Rescript. Perhaps the
aforesaid Advocate produced it from some
copy of the *Gregorean* Code, more complete
than the Fragments come to our hands, or
likely from the Code* of *Justus Papirius*, (e)
containing the Constitutions of the Imperi-
al Brothers, which in my Opinion, is at
this time no where extant. Here are the
words of the Rescript. *MONEMUR et tem-
poris diuturnitate quo ignorantia Juris in
matrimonio avunculi tui fuisti, et quod ab avia
tua collocata es, et numero liberorum. Id-
circoque, cum hæc omnia in unum concurrant,
confirmamus statum liberorum vestrorum in eo
matrimonio quæ vestrorum (lege quæditorum)
quod ante annos, XL. concitatum est, proinde
atque si legitime concepti essent.* We have
taken into Consideration the length of time,
during which, through Ignorance of the
Law, you remained in the married State
with your Uncle, your having likewise been
given away by your Grandmother, together
with the number of your Children; Where-
fore we, all these Circumstances concurring,
confirm, as requested, the Condition of your
Children in that marriage, it having been
consummated upwards of forty Years, in
the same Manner as if they had been law-
fully begotten. And there are undoubtedly
in the *Policraticum* of *Sarisburyensis*, some
Frag-

(e) *Justus Papirius* a Roman Lawyer, who flourished in
the Reigns of the Imperial Brothers, and *Marcus Aurelius*,
and collected their Rescripts.

Grot. de Vitis Jurisconsult. p. 163.

Fragments of the Antients, which are no where else to be met with. It appears from the Writings of the aforesd *Peter*, Archdeacon of *Bath*, called also *Blesensis*, that he, ‡ as well as many others, who lived together in the Family of *Thomas* Arch-bishop of *Canterbury*, in the reign of King *Henry* the 2d, closely applyed themselves here to the Study of the Imperial Law.—He indeed afterwards studyed Divinity, but at the same time, what kind of use was then made in this Nation of the Imperial Law by the *Civilians*, may be collected from what he has, whilst he studyed the Law, delivered down concerning himself, and those of the same Profession, who lived together with him in the Family of the aforesaid Archbishop. *In Domo Domini mei Cantuariensis Archiepiscopi viri literatissimi sunt, apud quos invenitur omnis reſtitudo Juſtitia, omnis cautela providentia, omnis forma Doctrina. Iſi poſt orationem et ante comeſtionem, in Leſtione, in Diſputatione, in Cauſarum deciſione jugiter ſe exercent.* OMNES QUÆSTIONES REGNI NODOSÆ REFERUNTUR AD NOS, quæ cum inter ſocios noſtros in commune auditorium deducuntur, unusquisque ſecundum ordinem ſuum ſine lite et obtreſtatione ad bene dicendum mentem ſuam acuit, et quod ei conſilioſius videtur et ſanius, de vena ſubtiliore producit. Quod ſi Deus minori quæ potiora ſunt revelaverit, ejus ſententiæ ſine omni invidia et depravatione univerſitas acquieſcit.—Very learned Men, ſays he, are to be found in the Family of my Lord, the Archbishop of *Canterbury*, among

‡ Pet. Blesens.
Epis. b. 6. 26.
71. 140. et in
Apuscul. p. 491.

among whom, all Uprightness of Justice, all cautious Foresight, every kind of Literature, is to be met with. Those Persons constantly after Prayers, and before their Refection, exercise themselves in Reading, Disputation, and deciding of Causes. ALL THE KNOTTY QUESTIONS WHICH ARISE IN THE KINGDOM, are referred to us, which being proposed to our Associates in the Common Hall, every one, according to his rank, without Contention, or Reflection, endeavours to speak to the Purpose, and displays, according to the very best of his Capacity, whatsoever appears to him most prudent and sound. But the whole Body, if God is pleased to reveal to one of the Juniors any thing preferable to what has been before offered, acquiesces, without any Envy or Cavil, in his Judgement. Not very long after, (f) *Sylvester Giraldus Cambrensis*, who flourished in the Reigns of King *Richard*, and king *John*, in his *Distinctions*,* concerning the Institution of a Prince, cites, under the Name of Elements, the Institutes of *Justinian*, supposing them, as the first Principles and Rudiments of the Law, simply and absolutely so called, to have been already received among us. In *Elementorum libro*

* Pet. Blesens.
Epist. b. 6. c. 16. 71
140. et in Apoc.
col. p. 427.

(f) *Sylvester Giraldus Cambrensis*. He was of Noble Extraction, and born in 1146, in *Pembrokeshire*. His Family Name was *Barry*. He was one of the most learned and eloquent Persons of his Age. Attained to great Honours, was the Author of many Treatises, and a great Enemy to the Monks. He lived to be upwards of Seventy, and was interred in the Cathedral Church of *St. David's*.

Tanner Bib. p. 323.

libro scriptum, in capite reperies Imperatoriam majestatem non solum armis decoratam sed et legibus decet esse ornatam.—

In the Beginning of the Book of Elements, he tells us, you will find it written, that Imperial Majesty, ought to be able, not only to shine in the field, but to be also well versed in the Law. These are the first Words in the Preface to the Institutes of Justinian. It is true indeed, that these Institutes were, as it is plain from the *Cujacian*, and the other Editions which copy after it, published also from some antient Manuscript under the name of Elements, and even Justinian himself calls them by that Name in his Preface. (g) *Gervase of Tilbury* likewise, in a Treatise of his, concerning Imperial Pastimes, addressed to the Emperor *Otto* the fourth, speaking of his Country *Brittain*, and of its Length, and Breadth, takes the Proportions of its Extent, from the Digests, as from Books, allowed by every one, of Authority here. This Author flourished in the Reign of King *John*. *Hæc Insula omnium uberrima in longum extenditur octingentis miliaribus, in latum ducentis. Vicenis itaque millibus passuum pro dietis computandis ut ff. siquis Cautionibus l. 1. protenditur in longum quadraginta dietis, et in latum decem.*

Our

(g) *Gervase of Tilbury*. He was Nephew to King *Hen.* the 2d. and supposed Author of the Black Book of the Exchequer.

Nicolson. p. 61.

* *Gervas. Tilbur. Mss. in B. b. lio, Cottoniana.*

Our Island, says he, the most plentiful of any in the World, is in Length, 800 Miles (in this his Account following Bede) in Breadth 200, allowing therefore 20,000 Paces for a Day's Journey, as in the *Pandect, si quis Cautionibus l. 1.* it is in Length 40 Days Journey, and in Breadth 10; for *Gaius*, citing that Title and Law, has these Words, *Vicena millia Passuum in singulos dies dinumerari Prætor jubet, &c.* The Prætor orders that 20,000 Paces shall be looked upon as the Standard of a Day's Journey, which was likewise formerly received by our own Lawyers, in what they call *Journees Accomptes*. *Journeys Accompts*, or *Dietas computatas*, a computed Day's Journey. And that highly magnified Vision of the Monk of *Evesham*, pretended to have happened in the Year of our Lord 1196, or in the Reign of King Richard the First, sufficiently proves, how greatly *England* abounded, even in those Days, with the Students in the Imperial Law. A Clerk, formerly this Monk's intimate Acquaintance, is therein represented § to be in the third Place of Punishment, in Purgatory. *Atque hic suo tempore eorum quos Legistas et Decretistas appellant peritissimus habebatur, unde in redditibus.* And this, says the aforesaid Monk, was reckoned the most learned of all the Civilians and Canonists of his Time, whence in the Revenues (so *Mathew Paris* has it) but it ought as appears from a very antient Manuscript which I have by me of that Vision, to be read thus, *earum etiam facultatum Auditores*
in

§ Apud. Mat.
Paris, an. 1196,
Roger Wendover
Mis. &c. 3.

in Scholis quam plurimos instituerat et subinde Magnatum familiaritem sibi conciliarat. Hinc redditibus.—(He had trained up

also a great many Disciples in the Schools of the aforesaid Faculties, by which means, he by Degrees insinuated himself into the good Graces of the great Men. Hence he by the Revenues) *Ecclesiarum ampliatus, &c.*

— of the Church becoming rich, &c.

'Tis evident the above Author, speaks in this Place of some Civilian or Canonist, who was either of our own Nation, or had lived here, and been a Professor among us; wherefore the learned in the Imperial Laws, were at that time, or about forty Years from the first public Lecture of *Vacarius* usually called from that Law among us, *Legistæ, Civilians*; and such as were Professors of the pontifical Law, were styled *Decretistæ, Canonists*. And these likewise taught at that time both the Civil and Canon Law, in several other Schools. The same Monk informs us, That this Clerk alone had brought up here a great many Lawyers, and that he was looked upon as the most learned of them all; upon which Account there is also good Ground to believe, that from the time of *Rogerus*, or thereabouts, a constant Use was made here of the aforesaid Institution, both with Regard to the Civil and Canon Law; And that the same Use continued likewise among us, till the Authority of the Pope was by Act of Parliament abolished in this Nation. For, from that Time, all the

* Vid. Visionem
Thurcilli Purga-
torii in Mat. Pa-
ris an. 120. b.

public Lectures, Professorships, and Dignities in our Universities, regarded not the Pontifical, but the Civil Law only. All those who during the aforementioned Ages joined the Studies of the Imperial Law to that of their own Country were among us said to be—*legum etiam mundanarum periti* *—learned also in the Secular Laws. Neither do I find that Authors in that Age, always made a plain Distinction between the Professors of the Imperial, and those of the English Laws here. Both seem to have been, at least by some, called Civil, the Use of them being, though after a very different Manner, allowed of in our Courts. The following Lines of *Walter Mapezius*, (a) at that Time a celebrated Court Preacher here, concerning the Preaching of *Goliab* (this being the feigned Name he borrowed) to the Terror of all, and of the last Day of Judgment, must have Relation to the aforesaid Reigns of the Kings, *Henry the 2d. Richard the 1st. and John.*—

*Cogitate Divites, qui vel qualis estis
Quid in hoc Judicio facere potestis.
Tunc non erit aliquis locus hic Digest s.
Idem erit Deus hic Iudex, Autor, Testis,
Judicabit judices Iudex generalis.
Nil ibi proderit Dignitas Regalis, &c.*

Apud

(a) *Walter Mapez.* was a witty old Fellow, who lived in the Reign of *Henry the second.*

Carr's Hist. Eng. v. i.

Camd. Remains, p. 247

*Apud nostros Judices Jura subvertuntur
Et qui legem faciunt lege non utuntur.*

The aforesaid Preacher discoursing in his Sermon concerning all kinds of Administration of Justice among us, mentions the Digests, as if he took it for granted that they were made Use of in all the Courts here. And there are, with regard to the Imperial Law being admitted into the Pontifical, as far as this was in those Ages practised here, many plain Testimonies, both in the Appendix to the third Council of *Lateran*, held under Pope *Alexander* the third, and in the more antient Collections or Compilations, as also in the Gregorian Decretals, in which a great number of Instances of Forensic Suits, at that time instituted in *England* (in the Pontifical Consistories indeed) both according to the Imperial and Pontifical Law are to be met with among the Papal Rescripts; the Grounds of which Law Suits were also discussed according to the Imperial or Justinian Law. And we are certain, that *Hubert Walter*, (b) Archbishop of *Canterbury*, a Pupil of

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(b) *Hubert Walter*, born at *West Deerbam* in *Norfolk*, and educated in the Family of *Ranulph de Glanville*; He was Archbishop of *Canterbury* in 1193.—Chief Justiciary of *England*, and Legate of Pope *Celestine* the third in 1194, and Lord Chancellor, in 1199.—but Pope *Innocent* the 3d. would not renew his Legatine Power, and likewise required him to resign his Office of Justiciary (as not tenable by the Canons) which he did in 1198, and dyed the thirteenth of July 1205. *Carts. Hist. of Eng.* v. 1. p. 805.—*Du Cange*, Tit. *Justitarius*.

† Joscelin in
vita Hubert.

§ Mat. Paris in
Ric. rege an.
1198.

|| Vid. Henricum
Spelman in Glos.
verb. Cancellari-
us.

Ranulph de Glanvill's, † exercised in the Reign of King *Richard*, the Office of High Justiciary of *England*, § and must of course have been been very instrumental in causing a particular Regard to be paid in the Universities and Courts to the Imperial Law, thus chiefly by those of his own Function lately admitted among us. The like may be said of the Chancellors || of *England*, and of others, usually at that Time advanced out of the Hieratical Order, to some of the highest Dignities in the public Government. And Bishops now and then enjoyed the Offices, both at one and the same Time, of Chancellor and Justiciary of *England*, as *William* Bishop of *Ely* did under the just mentioned King *Richard*. Yet it is very common for Historians, even in those Ages, to make more express Mention

How great the Office and Power of the Justiciary of *England* was, take from Spelman's *Icenia*, where mentioning *West Deerham*, the Birth Place of this great Prelate, he adds, "Hic Hubertus sub *Ranulpho de Glanvilla*, illustri illo totius Anglæ justituario enutritus, evasit Archiepiscopus Cantuariæ, Cancellarius Regis *Richardi* I, Legatus Papæ *Celestini* IV. et totius etiam Angliæ Justitarius. Miraberis tot in unum collatos Magistratus, præsertim si recte intellexeris quanti sub hoc seculo munus fuerit Justitarii, potestate scilicet, omnes regni Magistratus, dignitate omnes superantis Proceres. Post Regem, primus universam complectebatur solus rem judicariam; Officium Capitalis Justitarii regis tribunalis, Capitalis Justitarii Civilium Placitorum, Capitalis Baronis Scaccarii, et in plerisque Magistri Pupillorum, Disposuit de Thesauro Regis, et in regni arduis elato peragebat omnia supercilio. In Absentia Regis (quæ sub istis seculis crebro accidit) regni Custos et Pro rex salutatur.——Spelman's Remains, p. 140.

tion of Persons—*legum terræ peritorum*—learned in the Laws of the Land. And doubtless there were a great many in those Days, who wholly applied themselves, *legibus terræ*, to the Study of the Laws of the Land, or to those of our own Country, without the least Regard to the Imperial Laws.

S E C T. II.

Some Footsteps of the aforesaid Use here, such as it was, under the Reigns of *Henry* the 3d. and *Edward* the 1st; which last invited over *Francis Accursus*, to make public Lectures in *England*.

THERE are in *Bracton*, in the Reign of King *Henry* the 3d. as has been before shewn, very ample Testimonies with Regard to this Matter; and I am of Opinion, that what we find in the public Records, concerning the Schools in the City of *London*, in which the Laws were taught in the Time of the aforesaid King, must be referred to this Period. Here are the Words—† *Mandatum est Majori et Vicecomitibus London quod clamari faciant et firmiter prohiberi ne aliquis Scholas regens*

† Rot. Claus. 19
Hen 3. membran.
16. seu Anno
1234.

de legibus in eadem civitate de cætero ibidem Leges doceat. Et si aliquis ibidem fuerit hujusmodi Scholas regens ipsum sine dilatione cessare faciant. Telle R. apud Basing XI die Decembris. The Mayor and Sheriffs of the City of London are commanded to cause to be proclaimed and strictly enjoined, that no Regent of any Law Schools within the same City, do for the future teach (a) Law therein: and that if any such Regent be therein found so acting, they without Delay cause him to desist. Witness the King at *Basing*, the eleventh Day of *December*. There is no Probability that this Mandate was issued, with an Intent to prohibit, either the *English* Laws, or public Lectures on them. And tis past all doubt, that not only Grammar, but other Sciences also, were of old, and long before the Foundation of *Gresham* College, publicly taught in the Schools, and Disputations * held therein upon them. In an ancient Manuscript Register of the Customs of the Cathedral Church of *St. Paul*, the fol-

* Vid. Stephani-
dem seu Fitz-
Stephen de Urbe
Londin. et Joan.
Stowæum in No-
titia Londini.

(a) *Law therein.* The Word, Law, or *Leges*, being a general Term, may create some doubt at this Distance of time, whether the teaching of the civil Law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the Civil Law is only prohibited (which is Mr. *Selden's* Opinion) it is then a retaliation upon the Clergy, who had excluded the Common Law from their Seats of Learning. If the Municipal Law be also included in the Restriction, (as Sir *Edward Coke* understands it, and which the Words seem to import) then the Intention is evidently this: by preventing private Teachers within the Walls of the City, to collect all the Common Lawyers into the one public University, which was newly instituted in the Suburbs. *Blacks: Introd.* V. 1. P. 24.

following, is, among the Offices of the Master of the Grammar School, formerly founded there, also mentioned. — *Item quod more solito Deputationes Dialecticæ et Philosophiæ teneat apud Sanctum Bartholomæum in festo ejusdem, et Disputata apud Sanctam Trinitatem.* — Likewise that he, according to the usual Custom, hold Disputations (a) in Logic and Philosophy at Saint Bartholomews, on the Day of his Festival, *et disputata*, at the House of the blessed Trinity. We have also frequent mention in the public Records of King Henry the 3d. of *John de Lexington*, (b) or *Lessington*, a celebrated Chief Justice, who in the Annals of the Monastery of **Burton*, is styled *Seneschallus Regis, et vir providus et discretus, et in utroque jure Canonico scilicet et civili peritus.* — The King's Steward, a prudent and discreet Man, and learned both in the Canon and Civil Law. Tis likewise evident from our Histories and Archives, that Prelates and other Persons in holy Orders, who had applyed themselves as well to the Study of the Imperial and Pontifical Law, as to the Laws of *England*, were frequently in those Ages Judges in the

O 4 King's

* Annal. Cænob.
Burtonens. Mss.
in Bibliothec Cotton.
Anno 1255.

(a) *Desputationes.* Mr. Selden reads *Disputationes.* See Selden's Notes on *Fortescue*, p. 56.

(b) *John de Lexington.* He had the Custody of the Great Seal, in 31 H. 3d. 1247. was joint Keeper of it with *P. Chaceport.*, in 1253, and was one of the Justices in *Eyre*, for London, 1251. but don't find he had been chief justice either of the Court of King's Bench or common Pleas. *Dug. Origin.*

King's Courts, and did in fact exercise among us, all Kind of Jurisdiction. And it is a Truth, which needs no Proof, that Priests also learned in these Kinds of Studies, were at that time here employed as Advocates in all the Courts; which is likewise clear from the Legatine Constitutions of *Otto* (a) and *Ottobon*, (b) concerning as well the Office of Advocates, as the Prohibition laid on the Hieratical Order, against their exercising such secular Jurisdiction in this Nation. With regard to the Reign of King *Edward* the first, what we have before observed on this Head out of *Thornton*, and *Fleta*, may be referred to this Period. To which likewise, what is found in our Archives, concerning *Francis Accursius* the Son, a Doctor of Laws, is to be applied; namely, that King *Edward* the first invited him and his Family over into *England*, doubtless to teach the Imperial Laws at Oxford; and that the said *Francis* had at least resolved upon coming hither, though perhaps he did not execute his Design, for indeed, from what we are going to produce, it cannot be concluded that he actually came hither; though it is evident, from the following Mandate * of the aforesaid King to

† Pat. 4. Ed. 1.
membran. 35.

(a) *Otto*. He was a Cardinal-Deacon, Legate of Pope *Gregory* the 9th, and held a Council at London, in 1237. 22d. Hen. 3d. *Spelm. Concil.*

(b) *Ottobon*. Cardinal-Deacon, Legate of Pope *Clement* the fourth, and held a Council in 1248, 32d Hen. 3d, was elected Pope the 11th of July 1276. *Spelm. Concil. Bomyer's Lives of the Popes*,

to the Sheriff of Oxon, for lodging *Accursius* commodiously there, that he was invited over to this Nation. — *Rex Vicecomiti Oxoniæ Salutem. Præcipimus tibi quod Francisco Accursii Doctori legum vel ejus mandato hæc literas nostras deferenti, liberes Manerium Oxoniense ad inhabitandum una cum Uxore sua et familia quamdiu nobis placuerit. Nolumus tamen quod tu propter hoc impediaris quin diebus statutis in Aula ipsius Manerii tenere valeas Comitatum. In Cujus rei Testimonium, &c. Teste Rege apud Windesore septimo Die Decembris.* — —

The King to the Sheriff of Oxon, greeting,
We command you to put *Francis Accursias*, Doctor of Laws, or whomsoever he shall appoint the Bearer of these our Letters, in Possession of our Manor-house at *Oxford*, (at that time the King's Palace or Castle,) to dwell therein with his Wife and Family during our Pleasure. Nevertheless, we will not that on this Account you be hindered from holding on the stated Days your County Court, in the Hall of the same Manor House. In Testimony, whereof, &c. Witness the King at *Windesore*, the 7th Day of *December*. This *Francis*, was the Son of *Accursius* the *Florentine*, that most celebrated Author of *Glosses*; and as the Name of *Accursius* the Father, is a thousand times subjoined to the *Glosses*, so *Francis*, and *Francis* the Son of *Accursius*, who is the very Person thus invited over into *England*, is often added, and that chiefly

chiefly to *Glosses*, on what is called the *New Digest*. We have also the *Institutes* with his *Glosses* annexed. None of the Biographers of the Lives of the Lawyers mention his having arrived in *England*; but they tell us he had agreed with the King of *England*, (plainly our *Edward* the first,) to come from *Bononia* into *France*, to teach the Imperial Law, in the Territories there subject to the King of *England*, and that he at last set out from *Bononia*; but so much against the Will of his fellow Citizens, that they on that Account mulct-ed him, by a Confiscation of his Goods, which was afterwards, on his return, repealed. Guido Panzirolus * tells us, that

Is a Rege Angliæ in Galliam, ut ibi doceret, deducendus erat, quod cum Bononienses præsensissent, pæua publicationis bonorum indicta præceperunt ne recederet. Ipse vero Cives eludens, omnibus amico venditis, discessit, sed bona nihilominus sunt publicata, unde redire coactus, ubi reversus est eorum Restitutionem † impetravit. Interea Tolosa jus civile aliquamdiu docuit. — The same *Francis*, was to have been by the King of *England* brought over into *France*, to teach the Laws there, of which the *Bononians* being apprized, they commanded him, on Pain of Confiscation of his Goods, not to depart from thence. But having, by selling all his Goods to a Friend, eluded his fellow Citizens, he set out for *Bononia*; his Goods nevertheless were confiscated, which

* Guid. Panzirol. de clar. leg. Interpret. 1, 2, c. 29.

† Vid. Alberic. in l. 17. hi qui C. tit. de rescindenda venditione.

which obliged him to return; whereupon they were restored to him. He in the mean while taught for some Time the Civil Law at *Tboloufe*. — From hence may be gathered, that he neither came into *England*, as well as the Reason of his not coming hither, pursuant to his Agreement with the King. This learned Person died at *Bononia*, where a Monument is erected to his Father and him, with this short Inscription.*

* Joan. Fichardus in vit. Jurisconsult. Valent. Forsterus, &c.

*Sepulchrum Accursii Glossatoris Legum.
Et Francisci ejus Filii.*

The Tomb of *Accursius* the Author of the
Glosses on the Laws.
And of *Francis* his Son.

Which Royal Mandate above-mentioned, plainly proves that the same *Francis* survived his Father (who, as Authors tell us, died in the Year 1229) down to the Year 1276, that Mandate agreeing with this Year. The aforesaid *Roger* (a) *Bacon*, § who lived at that Time, gives the following Account of the frequent Use made of the Imperial Law among us in the Reign of the aforesaid King, particularly by Persons of the

§ Roger. Bacon in Compend. Theolog. seu Opere. Minori Mss.

(a) *Bacon Roger*, (a learned Monk of the Franciscan Order). He was born near *Ilchester* in *Somersetshire* in the Year 1214, was descended of a very antient and honourable Family, and dyed about the Year 1294, being esteemed the brightest and most universal Genius, that perhaps the World ever saw. *Biographia Britannica*. v. 2d. p. 341.

the Sacerdotal Order, or the Clergy, who, too often in this, as well as in former Ages, (whatever their own sacred Canons decreed to the contrary,) enjoyed in all the King's Courts of this Realm, the highest Offices of the Law.—*Omne Regnum habet sua jura quibus laici reguntur; ut jura Angliæ et Franciæ. Et ita fit Justitia in aliis Regnis per Constitutiones quas habent, sicut in Italia per suas. Quapropter cum Jura Angliæ non competant statui Clericorum, nec Franciæ, nec Hispaniæ, nec Alemanniæ, similiter nec Jura Italiæ ullo modo. Quod si debeant Clerici uti legibus Patriæ, tunc est minus inconveniens ut Clerici Angliæ utantur legibus Angliæ, et Clerici Franciæ utantur legibus Franciæ; quapropter maxima Confusio Clericorum est quod hujus modi Constitutionibus laicalibus subdantur Colla. Rex quidem Angliæ Stephanus allatis legibus Italiæ in Angliam publico Ediçto prohibuit ne ab aliquo retinerentur, si igitur Laicus Princeps laici principis alterius leges respueret multo magis omni Clericus, deberet respuere leges laicorum. Addo etiam quod magis concordant jura Franciæ cum Angliæ, et e converso, propter vicinitatem regnorum et communicationem majorem gentium istarum quam Italiæ et illarum. Quare deberent magis Clerici Angliæ subicere se legibus Franciæ, et e converso, quam legibus Italiæ.*—Every Kingdom, says he, has its own Laws, by which the Laity is governed; for Instance, *England* and *France* have their respective Laws. So likewise Justice

is administered in other Kingdoms, as in *Italy*, according to their own Constitutions; wherefore if the Laws of *England* are not suited to the State of the Clergy; much less are those of *France*, *Spain* and *Germany*, or *Italy*. But if Ecclesiastics ought to be governed by the Laws of the Country they live in, it is then more convenient for the *English* Clergy, to be governed by the Laws of *England*, and for the Clergy of *France*, by those of their own Country; wherefore great Confusion is introduced among the Clergy, by subjecting themselves to such lay Constitutions. After the Laws of *Italy* had been brought over hither, our King *Stephen*, by a public Edict prohibited any one to retain them; therefore if one secular Prince is at Liberty to reject the Laws of another, much more ought the whole Body of the Clergy to reject the Laws of the Laity. It may be likewise added, that there is, on Account of *France* and *England* being neighbouring Nations, and from their having a greater Intercourse with one another than they have with *Italy*, a greater Harmony between their respective Laws. Wherefore the Clergy of *England*, ought rather to submit themselves to the Laws of *France*, and the *French* Clergy to those of *England*, than to the Laws of *Italy*. ——— Thus far *Bacon*. (a)
Tho'

(a) This was a kind of Invective against the receiving of the Civil Law amongst the Clergy in any other nation, saving that wherein it was first bred, that is the *Italian*.

Seld. on Fortescue, p. 44.

Though this Author speaks only of Ecclesiastics, yet as it is certain that the Clergy in that Age filled among us the chief Places even in the King's Courts of Justice, it can't be doubted but that from the Use of this Law by the Ecclesiastics it gradually also gained ground in those Courts; and that it was manifestly, as such, applied in discussing of Causes. And the Commentary of *John de Acton*, (a) (by us commonly called *Athona*) on the Legatine Constitutions is to be consulted, for it will plainly appear from that Work, that the Imperial Law was, in that Age, as well as before, made Use of among the Ecclesiastics in this Nation. All this is likewise corroborated by the usual formulary, by which the Archbishops of *Canterbury* granted in those Ages to Professors of the Civil Law Licence to read it in the Universities, without which they were obliged personally to discharge their holy Functions in their respective Benefices. The following Licence of *John Peckham*, (b) Archbishop of *Canterbury* in the Reign of *Edward* the first, is to be seen in a Manuscript Ecclesiastical Formulary which I have by me.

Joannes,

(a) *John de Acton*. He was Canon of *Lincoln*, and dyed about the Year 1350. *Tanner*.

(b) *Peckham*. Born in *Sussex* and dyed in 1292.

Joannes, &c. dilecto filio Magistro R. de B. Rectori Ecclesiæ parochialis de W. talis diæcesis, Juris Civilis professori, salutem, &c. Fructum in Dei Ecclesia, quæ ad sui juris regimen literatis per maxime noscitur indigere, per te, legendo et proficiendo in Scientia literarum, afferri sperantes, ut per biennium a datu præsentium numerandum, in universitate Oxoniensi insistere valeas studio literarum et promoveri interim minime tenearis, nisi ad Ordinem subdiaconatus duntaxat infra annum recipiendum a tempore tibi commissi regiminis in Ecclesia supradiçta, tecum ratione Juris, &c. juxta formam Constitutionis Bonifacii † cum ex eo in ea parte editæ, libere dispensamus, ita tamen quod eidem Ecclesiæ interim deserviat laudabiliter in divinis et Animarum cura diligenter exerceatur in ea. Proviso etiam quod Procuratorem idoneum ibi constituas qui medio tempore ordinariis respondeat vice tua, quodque absentia tuæ damnum recompensetur elemosynarum largitione nostro arbitrio facienda, Dat, &c.

† C. unic. lib. 6.
tit. de excessib.
Prelat.

John, &c. To our beloved Son Master R. de B. Rector of the Parochial Church of W. in such a Diocese, Professor of the Civil Law, greeting, &c. We hoping that great Credit, by your professing of and making a progress in the Sciences, may accrue to the Church of God; which as to the Polity of its Rights is known to stand in great Need of Men of Letters, grant unto you our Licence to apply yourself for
the

the Space of two Years, to commence from the Date of these Presents, to the Study of Letters in the University of *Oxford*; during which Time, you shall be under no Obligation of entering into any other holy Order than that of a Sub-deacon, which you are to take upon you within a Year from the Time of your being appointed Rector of the aforesaid Church. We hereby, according to the Form of the Constitution, *Cum ex eo, &c.* to that Intent set forth by *Boniface*, freely dispense with you on Account of your Application to the Law, on Condition nevertheless, that in the mean time the same Church be properly served in all sacred Offices; and that every thing tending to the Care of Souls be with all Diligence exercised in it. Provided likewise that you therein constitute a proper Proxy to be, during your Absence, answerable in your stead to the Ordinaries. And that a Compensation be made for your non Residence, by such Alms as we shall judge proper. Given, &c.

Now the Title in the Margin is — *Dispensatio ad legendum*—a Dispensation to read, which was, as may be seen from the above Example, common in those Days.

S E C T. III.

Concerning the Reign of *Edward* the second, and some Laws out of the Pandects; the Places from whence they are taken referred to, as is usual, by our own Lawyers in the King's Courts.

WHAT we have related concerning the Use of the Imperial Law in the above Age, is likewise confirmed by what occurs in the Law || Annals of King *Edward* the second, (a) most beautifully transcribed from the Manuscript of *Richard de Winchedon*, who lived at that Time and was in all Appearance the first Compiler of them, and given by Sir *John Baker* Knight, Chancellor of the Exchequer in

|| Mss. in Biblio.
theca Interioris
templi. Vid.
ibi. 1. Ed. 2.
fo. 2.

(a) *Edward* the 2d. These Reports were solemnly recommended to the Press by that great Oracle of the Law the Lord Chief Justice *Hale*, upon Occasion of the Authorities cited out of them in *Sacheverell* and *Frogate's* Case, and were published by Sir *John Maynard* Serjeant at Law, with the Approbation of the Chancellor and all the Judges.

P

the

the Reign of King *Philip* and Queen *Mary*, to the Library of the *Inner Temple*, of which he was a Member. For in those Annals, not only the very Words of the Imperial Law, † and of its Rules, are, in debating the Cases in Court before the Judges, sometimes quoted at large, tho' indeed without the particular Places from whence such Quotations are taken being expressly mentioned, (which Custom also is even at this Time sometimes practised by our Lawyers) but it is now and then admitted, that the Matter depends on the Authority of the Civil or Imperial Law : and the very Texts also of the same Law, are, according to the usual Manner of citing handed down from former Ages, particularly referred to. We have therein a remarkable Instance of the Authority of the Imperial Law, and in what Manner it was then applied, conformable to which, Decisions were either made, or it was then at least the current opinion that Matters ought to be decided according to that Law. A Statute was enacted that, * *Si Deprædationes vel rapinæ fiant Abbatibus, Prioribus. &c. et ipsi jus suum de hujusmodi deprædationibus prosequentes morte præveniantur, antequam judicium inde fuerint affecuti, Successores eorum habeant actiones ad bona Ecclesiæ suæ de manibus hujusmodi transgressorum repetenda.*—(a) If any Wrongs
or

† Mss. in Biblio-
thec. interioris.
Templi Mich. 12
Ed. 2. fol. 151. a.

* Stat. Marl. c.
30. 52. Hen. 3.

(a) This is c. 28. in the printed Editions of the Statutes.

or Trespasses be done to Abbots, or other Prelates of the Church, and they have sued their Right for such Wrongs and be prevented with death before Judgment be given therein, their Successors shall have Actions to demand the Goods of their Church out of the Hands of such Trespassers.—

Seius had spoiled *Titius* (Prior of *Wallingford*) of his Goods. *Titius* is deprived of his Dignity and *Sempronius* put in his Place, who brings on that Account * his Action against *Seius*; This last pleads that *Titius* was still alive, and therefore not prevented by Death, according to the aforesaid Statute, on which the Action was grounded. But it was determined, as it had likewise been both in the Time of *Edward* the † first and two Years before decided in the Case of the Prior of || *Lanton*, that the Exception would not hold; the Reason thereof being in this Case added, but somewhat called in Question and disproved from the Civil or Imperial Law by him who first took it down; and lastly affirmed out of the Civil Law by him who transcribed the same.—*Quia duplex est Mors, et Naturalis et Civilis, et in hoc Casu mortuus est prior quia Dignitate privatur. Sed Clericus qui Librum istum scripsit videlicet Richardus de Winchedon dicit quod salva pace Seniorum suorum, et salvo meliore iudicio minus bene dicunt, quia quamvis quis Dignitate privatur; morte civili non est affectus.*—Because there are two Kinds of

* Mss. in Bibliotheca in'erioris Templi Mich. 12. Ed. 2. fo. 151.

† Temp. Ed. 1. Fitzherbert. tit. Trespass. 242.

|| Pas. 10. Ed. 2. fo. 133. b.

Death (so the Manuscript runs) Natural and Civil, and in this Case the Prior is dead because he is deprived of his Dignity. But the Ecclesiastic, to wit, *Richard de Winchedon* who compiled that Book, says, that with due Respect to his Elders, and with Deference to those of better Judgment, they are in the wrong, for though a Person is deprived of his Dignity, yet he is not thereby considered as civilly dead.—Thus far the said *Winchedon*; but the Person who transcribed the aforesaid Manuscript of *Winchedon* subjoins to it is own Opinion also.—

— *Sed hujusmodi privatio dignitatis vocatur, prout memoriae meae occurrit in jure civili, media Capitis Diminutio. Sed hic mortuus est civiliter qui efficitur Servus pœnæ, licet nondum mortuus; sicut etiam qui deportatur in insulam, id est exulat, velut is cui Aqua et Ignis sunt interdicti, ut Utlegatus.* — But such Privation of Dignity, says he, to the best of my Remembrance, is in the Civil Law called *Media capitis Diminutio*. Now that Person who is to undergo the Penalty, is civilly, tho' not naturally dead, as likewise is one who is perpetually banished into an Island, that is, exiled, or one, to whom as to an Outlaw, the Comforts of Fire and Water are interdicted.—The same Decision is mentioned in a Manuscript of Law Annals in the Reign of the same King in the Library of *Lincoln's-Inn*, the Reason being only as follows. *Quia Duplex est Mors, scilicet civilis et naturalis, et in hoc casu Prior fuit mortuus, quia Dignitate privatur*

vatur, jure civili.—Because there are two Kinds of Death, to wit, Natural and Civil; and in this Case the Prior, on Account of his being deprived of his Dignity, was by the civil Law adjudged dead—wherefore they thought that a Privation of Dignity, taken *pro media Capitis Diminutione*, inferred also a Civil Death, (which the Judges of that Age understood to be implied, as well as a natural Death, in the aforesaid Statute) and this they concluded from their Interpretation of the Imperial Law. § Concerning which very Matter, a Dispute had arose between the Lawyers who flourished at that Time, as we are well informed by that most eminent Lawyer *Odo-*
fredus, ‡ who lived in the Reign of King *Edward* the first.—*Quære** *quid si aliquis in Dignitate constitutus eam perdit, ut quia Princeps, vel Episcopus, nunquid dicitur Capite minui? dicunt quidam quod sic, quia prior status mutatur, &c.*—Suppose, says he, any one who enjoyed a Dignity be deprived of it; as should a Prince or a Bishop, can he be said, *capite minui*? Some say he may, because his former State is altered.—I before observed that the Pandects were twice cited in that Manuscript of the Annals of the Law in the Library of the *Inner Temple*, the Titles and Laws also, as is usual, being referred to. The first Case is in the fifth Year of the Reign of the same King, where an Action of Covenant had been brought against the Defendant on a promise to marry the Plain-

§ D. tit. de Capitis deminutione L. 11. Instit. eod tit.

† Odofred. ad L. 2. D. tit. de cap. Deminut. Et vid. ibi. D D. Et ad L. 3. D. tit de Senatoribus.
 * Pas. 5. Ed. 2. fo. 73. b.

tiff, and in the mean time to maintain her. The Question was, whether the Defendant was obliged to perform his Promise immediately after making it? Upon which, *Hervey* Counsel for the Plaintiff says—*Si jeo me oblige a vous en M^{li}. et en l'escript il ny ad pas jour de paie nest pas la dette due maintenant apres le fescance del escript? Certes cy est.*— If I bind myself to you in 1000 l. and no Day for Payment is specified in the Writing, is not the Debt due immediately after making the said Writing? Certainly it is—and gives this Reason for it out of the Imperial Law. — *In omnibus obligationibus quibus Dies non ponitur, præsentī die debetur ff. de Regulis Juris in l omnibus.* — In every Obligation wherein the Day is not fixed, it ought to be performed the same Day—which are the Words of *Pomponius*, l. 14. under the same Title, from which Place they are thus expressly quoted; but I could never find in the Manuscript in *Lincoln's-Inn* Library the least mention of this Case. The second is in the twelfth || Year of the Reign of the same King, in which *Seius* brought his Action against the Abbot of *Abingdon* for taking away some of his Goods. The Abbot pleads that there had been Time out of Mind a Custom in *Abingdon*, that whoever brewed and sold Ale there, should pay one Penny (called *Colcestre* Penny) to the Abbot, for non Payment whereof the Abbots had always by the same Custom a Right

† *Hill.* 12. E.
2. fo. 156. a
Mss.

Right to distrain on the Goods of the Person liable to pay it ; that *Seius* both brewed and sold Ale without paying the same, wherefore he took the aforesaid Goods as a Distress. In Answer to which, *Devon*, Counsel in that Case for *Seius*, says that this Custom was introduced without just Ground and to the Prejudice of others, and that the Abbot cannot in Consequence thereof be intitled to any Right over the Plaintiff. —

Quia quod non ratione introductum est, sed errore primo, deinde Consuetudine obtentum, in aliis similibus non obtinet.

ff. De legibus, lege, non obtinet. —

— Because whatever is introduced, not grounded on Reason, but originally through Error, and by Degrees grown into Custom, is in other like Cases of no Force. — They are the very Words of *Celsus* there, l. 39, which *Devon* in this Case cites in Court to the King's Judges, in the same Manner as that other Law had been before quoted by *Hervey* out of the Title *De diversis Regulis Juris*. And in the Margin here is added in old Characters, *Note Loe Nota*—Remark the Law Remark, — But notwithstanding this very Case is inserted almost in the same Words in the Manuscript, we have mentioned in *Lincoln's-Inn*, yet no such Citation is to be found in it : but indeed Citations from that Law, as is manifest from the Law Annals of King *Edward* the first and second, very rarely occur in our Au-

thors of that Age, and for my part, I have met with nothing at all of this kind in the Annals of *Edward* the first.

S E C T. IV.

The Use of the Justinian or Imperial Law has continued in the Pontifical Consistories and in two of the King's Courts (one of which takes Cognizance of Military, the other of Marine Affairs) as well as in our Universities down to our own Times.

BUT it clearly appears from what has been already produced that our Ancestors in those more earlier Ages made a twofold Use of the Imperial Law ; one prevailed in the Episcopal Consistories, and consequently in the Court of Delegates, to which, from those Ecclesiastical Tribunals, they appealed, as well as in the Studies of those who discharged therein the Offices of Judges, Advocates or Proctors ; the other was observed, at least in some of the King's Courts, those being usually distinguished by that Title, and the Nature of their Business, from the foregoing, and in the Studies of those who endeavoured to make themselves Masters of the Forms of Actions and Judgments

ments in such Courts. The first Kind of Use of the same Law here, to wit, as complicated with the Pontifical (not unlike the Union of the Snakes twisted about *Mercury's* Wand) and by it so moderated as to be of Force in those Consistories, when the sacred Canons § were not opposite to it, has thence continued down to our own Time. For instance, in Testamentary Causes, Succession with regard to the moveable Chattles of one dying intestate, Institutions and Substitutions to the Goods of such Persons, and in some other particular Cases, the Cognizance whereof, by Permission of the Laws of *England*, belong to those Consistories. And that there was such Use here, is evident, as well from the Commentaries of *John de Aston*, on the Legatine Constitutions, made in the Reign of *Edward* the first, as from those which *William Lindwood*, (b) in the Reign of *Henry* the 5th, added to the Constitutions of the Province of *Canterbury*. Many other Courts with respect to Matters of this Nature, were visibly formed after these Episcopal Consistories; those of several Abbots and others of the Hieratical Order, to whom the Privilege of Episcopal Jurisdiction was granted, were, as well as the Consistories of both Universities, of this Kind; for in these also the Use of

§ Vide his citat.
supra p. 504.
Alderan. Mas-
card. conclus. de
Statut. Interprete
2. f. 254. &c.

(b) *Lindwood William*. Born at Harpsfield, in *Lincolnshire*, and wrote a Collection of the Constitutions of the Archbishops of *Canterbury*, from *Step. Langton* to *Hen. Chicheley*. He was Keeper of the Privy Seal to *Hen.* the 5th. Bishop of *St. Davids*, in 1444, dyed Oct. 21. 1446. and was buried in the Chapel of *St. Stephen Westm.*

Collyer. Tanner

the Imperial Law prevailed, and has continued down to our Days. But as to what relates to the King's Courts, as usually contradistinguished from the Ecclesiastical Consistories, the Use of the Imperial Law, as handed down to us from former Ages, is to this Day retained in two of them, to wit, the Marine or Court of Admiralty, and in the Court of Chivalry, or that of the Constable and Marshal of *England*, consequently in the Court of Delegates, to which Appeals are made from them, as also in the Cognizance of some extraordinary Marine and Military Affairs of a Civil Nature. The Judges and Advocates in those Courts profess that Law; yet even in those, the Justinian Law is moderated and enlarged. In the Court of Chivalry, *Monomachia* or Single Combat between the Parties at Variance is, though contrary to the Justinian || Law, allowed of. In the Court of Admiralty, what occurs under the Titles *Ad (a) legem Rhodiam de factu, de nautico favore, de Usuris nauticis, de Exercitoria actione*, and other Matters belonging to Marine Affairs, are usually handled according to the Justinian Law, and expressly taken from the Code of that Emperor, and from Interpreters upon it. But yet in such a Manner, that the *Oleronian (b)* Laws

|| C. tit. de Gladiatore L. unic.

(a) *Legem Rhodiam*. See *Dawson's Origin of Law*, p. 120.

(b) *Oleronian Laws*. See Note p. 54.

Laws likewise, or the Marine Customs so called, may, as is practised by other Nations, be blended with it, and be allowed to have the greatest Authority there. Wherefore those † learned Foreigners, who have unguardedly asserted in their Writings—*Anglis Romani juris nullum esse usum*—That the *English* make no Use of the *Roman Law*—are highly mistaken. The same may be said concerning the Use we have made of the Imperial Law, and of the Interpreters of it, in Treaties, and Engagements, to be entered into with foreign Princes, as well as in the Explanation of them, and in the Matter of Embassies. Wherefore doubtless, in the two above-mentioned Tribunals, and in the extraordinary ones of the same Kind, as well as in the Court of Delegates, to which Appeals were made from such Tribunals, the Use of the aforesaid Law was admitted and retained; because Foreigners, who were more accustomed to the Civil Law, were, as well as Natives, so frequently Parties in Marine and Military Causes. And the Reason why our Universities make Use of the Imperial Law in their Consistories is obvious. First, because the Study of that Law had flourished among them; next, that it might appear that equal Justice was distributed to Foreigners, who studied in those Universities, as well as to our own Countrymen, when any Differences arose among them.

† Renat. Chopin de Domatio Franciæ l. 2. tit. 15. S. 5. Et vid. Fran. Baldwin. in Proleg. de Jure civili.

S E C T. V.

Whatever Use was formerly made of the aforesaid Imperial Law, either in the rest of the King's Courts, or in the Studies and Writings of our own Lawyers, as such, it, about the Beginning of the Reign of King *Edward* the third, wholly disappeared.

BUT whatever Use might have been formerly made of the Imperial Law, during the above mentioned Interval in the rest of the King's Courts, observing the *English* Law called Common or Customary, or in the Studies of our own Lawyers, yet the same having been plainly neglected and rejected, about the beginning, if I am not much mistaken, of the Reign of *Edward* the third, it certainly soon afterwards disappeared. For no Footsteps of the Use of the same Law can be traced in our Annals, after the Reign of *Edward* the second, unless any one should conclude, that such Use continued, because a Rule of the same Law, or of the Pontifical, is sometimes indeed, though but very rarely, quoted in *Latin*, * and that without referring at the same time to any Author. This would be as unreasonable.

* Vid. 41. Ed. 3.
tit. Laborers 28.
Mowbray. Extr.
tit. de Reg. Jur.
72.
D. eod. tit. L.
108.

sonable as for any one to say, that *Littleton*, in writing his Elements on Tenures, made Use of the same Law, because he has therein inserted that celebrated Maxim of the Imperial Law.—*Partus † sequitur Ven-*

† D D. ad L. 7.
Partum C. tit. de
rei Vendicatione.

trem—The Offspring follows the Condition of the Mother — which even those who are wholly regardless of, and Strangers to that Law, are thoroughly acquainted with; or that *Plowden*, *Dier*, and *Coke*, had made Use of the same in their works, because even they sometimes here and there apply the Rules of the same Law in *Latin*, not as borrowed from the Imperial Law, but as originally connate with the *English* Law. Now that the public Use of the aforesaid Law, entirely vanished among our Lawyers about the beginning of the Reign of *Edward* the third, and that the Study of the Imperial Law here was indeed cultivated but by a few of our Lawyers under *Edward* the second, in my Opinion may be plainly concluded from the Cause of the Abbot of *Torre*, § debated in the King's Court, about the middle of the Reign of *Edward* the third, to wit, towards the Year 1347, by which it appears, that one of our celebrated Lawyers, called *Skipwith*, at that Time acknowledged himself entirely ignorant of the Meaning of the following Terms in the Civil Law, which no one who had at all applied himself to the Study of the Imperial Law could be supposed unacquainted with. The Case is this,

§ Mich. 22. Ed.
3. fo. 14. pl. 37.

The

The Abbot of *Torre* (a) was then impleaded by an Action brought in the King's Name for having caused a certain Prior to be summoned to the Pontifical Court at *Avignon* for erecting an Oratory — *contra Inhibitionem novi operis*—contrary to the Inhibition against erecting a new Building—and for not desisting from the Prosecution, although he had received concerning that matter the Kings Prohibition. *Skipwith*, an Advocate or *Serjeant at* (b) *Law*, that is a Doctor of the *English* Laws, says thus — *In ceux parols contra Inhibitionem novi operis ny ad pas entendement*—In these Words, contrary to the Inhibition of a new Work, there is no Meaning—wherefore he prays Judgment for the Defendant ; to whom Justice *Shardelow* makes this Reply. — *Ceo nest que un restitution en leur ley, per que a ce n' avoumus regard ; mes respondes si vous avez suy contre la Prohibition.*—That is no more than a Restitution according to their Law ; wherefore we pay no Regard to it ; therefore answer whether you have proceeded contrary to the Prohibition — upon which the Serjeant passed to other Exceptions. 'Tis true indeed that a Title is found in the Body of the Canon Law, || which doubtless is here pointed at by these Words—*leur ley*—their Law

¶ Extra. l. 5. tit
32.

(a) See *Black. Introduct*, p. 22.

(b) Afterwards Chief Baron of the Exchequer.

Law—*de novi Operis Nuntiatione*—concerning the Prohibition of a new Work — by which is understood a Prohibitorial Denuntiation or Inhibition either of a Judge or the party interested, to prevent any Persons injuring his Neighbourhood by erecting a new Building. But 'tis plain, that that

Title, as well as some others was transferred thither from the Imperial or Justinian Law, and that those who studied the same Law, or had read the Code of *Justinian*, could not be ignorant of it, it being extant both

in the Code ‡ and Digest.* And those most celebrated Lawyers, *Joannes, Ago, Accursius, † Hostiensis, Durandus, Odofredus, §* and others, had before that Time published Commentaries on it, or concerning it. And

of that Title and the Law relating to that Subject, *Odofredus* || who dyed after the demise of our King *Henry* the third, or in the Year 1265, says — *Lex est utilis et*

multum sibi vendicat locum in Civitate ista et ubique terrarum et in foro seculari et ecclesiastico, et materia hujus legis multum quotidiana est.—This is an useful Law, and

great Regard ought to be paid to it in this City (to wit *Bononia*) and every where else, both in secular and ecclesiastical Courts; and there is frequent Occasion for the Matter of this Law every Day.—But now if that antient Use of the Imperial Law or such as we find it in *Bracton, Thornton* and the Author of *Fleta*, and in the Annals of the Law during the Reign of *Edward* the second

‡ C. lib. 8. tit. 11.

* D. lib. 39. tit. 1.

† Hostiens. Sum.

lib. 5. cod. tit.

§ Odofred. Sepul. l. 4. cod. tit.

|| Odofred. ad Rubr. c. C. tit. de Operis novi nuntiatione.

cond, had continued in the King's Courts, or among our Lawyers down to the afore-said Time of King *Edward* the third; without doubt *Skipwith*, one of our Serjeants, who it is certain was thoroughly learned in the Laws of *England*, would not publicly and in open Court have acknowledged himself unacquainted with that singular, entire and well known Title of the same Law—*De Operis novi Nuntiatione*—concerning the Prohibition of a new Work—(which is the very same—*Cum Inhibitione novi operis*—and nothing of that Nature is contained in our *English* Laws) or would have so confidently asserted, that the Words—*Inhibitionem novi operis*—had no Meaning. Neither does it appear that *Shardlow*, then Chief Justice, fully understood the Meaning of those Words, when he tells us, that according to the Pontifical Law into which they were transferred from the Imperial, *Restitution* was meant by them—an Inhibition not being a Restitution. 'Tis however true, as is evident from the Pandeſts † and the Pontifical Law, * that such ample Restitution was to be made by that Interdict or Admonition to the Person injured, that whatever was erected contrary to the Inhibition was to be demolished. (a) Finally, from what has been said, we may justly conjecture, that the above antient Use

† ff. tit. de novi Operis Nunt.
L. 20. Prætor.

* Extra. tit. de novi operis Nunt.
c. 1.

(a) Demolished. See *Ayliff's Pandect. Civ. Law. l. 4. tit. 39.*

Use in the Imperial Law, whatever it had been among our Lawyers and in the King's Courts here, was, about the beginning of the Reign of King *Edward* the third, or near the Time in which the same *Skipwith* and his Cotemporaries applyed themselves to the Study of the Laws of *England*, wholly laid aside:

CHAPTER IX.

SECTION I.

Our Nation never admitted the Imperial Law into the public, called the Civil Government, whatever Effect the Use of that Law, such as it was, might have had among us, during the before mentioned Interval.

* C. 3. f. 5. p.
572. *Arquiinterca*

WE have already * shewn in what Sense, *Bracton*, *Thornton*, and the Author of *Fleta*, applied the Places, which they expressly quoted out of the Imperial Law. Neither indeed do the Testimonies which have been produced from other Authors, who flourished under the Reign of *Edward* the second, prove that they cited in any other Sense the afore-said Law. The same may be said of all the rest of our Lawyers, who, during the above Interval, made Use of that Law in their Studies, Discussions, Writing, or De-

Determinations, that is from the middle of the Reign of King *Stephen* or thereabouts, or from the Time that that Law was first brought hither, down to the beginning of the Reign of King *Edward* the third, being much about the Space of two hundred years. Now with Regard to the Effect of the aforesaid Use of the Imperial Law at that Time among us, 'tis certain, whatever some of our *English* Lawyers, who thus made some kind of Use of the Imperial Law, aimed at, or wished for; no Change at all, in Consequence of their Views, ensued in the public or what we call Civil Government; (I here speak of the Kings Courts, and other non pontifical Tribunals, excepting only the two before mentioned, to wit, the Marine and Military) and in Truth the sole Effect of that Use was, that such as applied it in the above Manner, thereby meerly shewed themselves, either skilled in Pretenders to or exceeding fond of the Imperial Law, or desirous of its being jointly with the Common Law of *England*, by public Authority, admitted into the Practice of the Courts; not that it should with Regard to the Administration of the Civil Government be at all considered as of any Authority. The *English* Nation also at that Time, and the Judges of the aforesaid Courts, in which Number *Bracton* himself, *Thornton*, and perhaps the Author of *Fleta* were included, were even during that Interval always extremely te-

nacious of the Customs of their own Country, to wit, of the common Law of *England*; and that they therefore, as far as I have been able to observe, would not suffer any Form either of Speech, Writing or Pleading to be taken from the Imperial Law, or inserted from it into their public Records. For the public Entries of the Declarations, Exceptions, Agreements, Judgments, and other civil and daily Affairs, transacted almost during that whole Interval in those Courts, are still preserved in our Archives. In these, scarce any other Footsteps of the Imperial Law, as it was at that Time admitted among us, can be traced, than what are to be met with in such like public Records of the succeeding Ages, or in those of our own; in which nothing favours of the Imperial Law, they widely differing both in Language and Sense from the Roman Law, and every where manifestly displaying the ancient Style of the *English* Law Courts, even such as it was before the Reign of King *Stephen*, or antecedent to the Time of the Imperial Laws being brought hither among us. No Judgment therefore can, either from the Writings of *Bracton*, *Thornton*, or the Author of *Fleta*, (in which the Use this Nation made of the Imperial Law as above represented, is to be found) or from those Passages expressly cited from the Pandects in the Law Annals of *Edward* the second, be formed of the Effect the Use of the aforesaid Law produced among us, but may plainly be gathered

thered from the just mentioned public Records or Archives during that Interval; to which, numberless Decisions also and Forms of Pleadings during that Period among us, some of which are printed and easily to be met with, others remaining dispersed in Manuscripts, as well as the Promptuary of Rescripts, may be added. This last called *Registrum Brevium*. The Register of Writs, has been handed down by the *English* from the earliest Times to Posterity, and has scarce one single Term of the Imperial Law to be found in it; yet we at the same Time meet with in the Forms of Pleading in the Pontifical Consistories, as well as in the Tribunals for marine and military Affairs, (which had received the Imperial Law,) a great Number of Expressions taken from thence. Nor does it indeed appear to me, that the very few Quotations in the above Authors of our own Nation, or those made Use of at the Bar, occurring in the Law Annals of *Edward* the second, are of greater Weight to prove that the Imperial Law, whatever were the Sentiments of the Authors who thus applied it, was at that Time admitted among us in Matters of public Government, as having in reality, and by public Sanction any Force; any more than the Passages out of *Plato*, *Aristotle*, *Demosthenes*, *Cicero*, *Seneca*, *Plutarch*, and such Authors here and there frequently quoted by the *French* Lawyers, as is evident from a great Number of their printed Plead-

Pleadings and Decisions, are Proofs, that the *French* look upon the Sayings and Sentences of the aforesaid Antients to be in Points of Law discussed in their Country of any Weight. Yet it ought not to be forgot, that Civilians and Canonists, whenever any Question arose in the Discussion of Actions instituted according to the *English* Law, and which was brought upon the Tapis to be determined, suitable to the Rules either of the Civil or Canon Law; such as Questions concerning Marriages, Wills, or other Matters, naturally belonging to the Courts or Consistories, in which the Imperial and Pontifical Law are in a few Things allowed of, were, in the Ages before spoke of, as well as in the following, † applied to and heard even in those Courts, which upon other Occasions made Use of the *English* Law. But our Courts make no other Use of such Lawyers or of the Law they Practise, than they do of Grammarians, Physicians, and such like, whenever a Question happens to arise between contending Parties, the Decision whereof depends on the Knowledge of their Arts.

† 7 Hen. 6. fo.
11. 6. &c.

S E C T. II.

The Averſion this Nation at that Time ſhewed to the Uſe of the Imperial Law in Matters of public Government.

TWO Reaſons may be aſſigned why the Imperial Law, however blended and applied among us, had in that Interval during which our Lawyers openly made Uſe of it in the manner we have related, no greater or any other Effect than what we have juſt now ſhewn. One is, the manifeſt and avowed Averſion our Anceſtors at that Time expreſſed for the Imperial Law, as far as it any Way concerned the public Government. The other is, the ſingular Eſteem the Nation ſet both on the *English* Law, which we call the Common Law, and on its Maxims, they being from the earlieſt Times adapted to the Genius of our Nation, and their conſtant and moſt firm Adheſion to it on that Account. As to the Averſion our Nation had to the Imperial Law, we have a memorable Specimen of it in the before mentioned Ediſt, published by King *Stephen* both againſt the Imperial Laws, and *Roger Vacarius* the firſt teacher of them among us, as well as the Inhibition

• Rot. Claus. 19
H. 3. Membran.
26. feu. anno.
1234.

already specified of *Henry* the third,* against the said Laws being read in the Schools of *London*. We may here also add the Answer publicly given about the same Time in the Parliament held at *Merton*, which sufficiently shews, that the States of the Kingdom were then in Dread, lest the Imperial Law or some Part of it, should either by itself or by Means of the Pontifical Canons, with which it then was, as it now is, blended, be fraudulently obtruded on the *English* Law, and the Customs of their Country founded on their Ancestors thorough Experience for many Ages, and on that Account unanimously admitted. An Instance

• Stat. Merton.
c. 9. 20 H. 3.
feu. 1235. vi.
Brac. l. 5. c. 19.
Et Flet. l. 1. c.
25. § 3, et lib. 6.
c. 39.

of this is to be seen in that singular Case,* wherein the Bishops desired that Children born in Concubinage might by a subsequent Marriage be legitimated, which the *English* Laws do not allow of. The Parliament returned the following Answer—— *Nolle se Leges Angliæ mutare, quæ hucusque usitatæ sunt ac approbatæ*--that they would not change the Laws of *England*, which had hitherto been used and approved — hereby, as it were, intending to signify, that the Imperial Laws were, with Regard to the public Management of Inheritances and Successions, by no Means to be admitted. It must indeed be granted, that the Bishops grounded their Petition on the following Maxim; — *Quia Ecclesia habet tales pro legitimis* ——— Because the Church owns such for Legitimate ——— as if the same had been originally a Part of the Canon Law. And indeed we know from a Rescript of

Pope *Alexander* the third, * sent into *England*, many Years before, to the Bishop of *Exeter*, as well as from other Rescripts, that the same Maxim was before that Time contained in the pontifical Law. But it is plain the aforesaid Maxim concerning the Virtue of a subsequent Marriage, was first transferred from the Imperial or Justinian, * into the Pontifical Body of Laws. Wherefore left, with Regard to the Succession to Goods of deceased Persons, so considerable a Change of the Laws in *England*, as the Bishops aimed at, who then earnestly recommended to us the Laws of the Church, though visibly taken out of the Body of the Imperial Law, should take place; and lest other such Changes should be, by an Example of this Nature, as is usual, with the greater facility introduced; which might also perhaps have given Room to think, that the *English* Nation acknowledged the Imperial Law to be of some Authority among them; what was thus endeavoured to be obtruded was rejected, as if the Parliament had said, We will not that either this, or any other Head, *Legum Cæsarearum*—of the Imperial Laws—be admitted among us, or, *Nolumus mutare leges Anglicanas legibus Cæsareis*—we will not change the *English*, for the *Imperial Laws*—or which amounts to the same, for the Pontifical Canons taken from thence. For it is evident, that by what they said, they did not simply mean, that they would never alter the Laws of *England*, or any part of them, they having made in this very Par-

* Append. ad Concil. Lateran. 1181. part. 33. c. 1. et c. 6. tanta est.
Extr. tit. qui filii sint legitimi.

* L. 5. Divi Constantini. C. tit. de naturalibus liberis.

liament Innovations in their Laws, and consequently variously altered them, to wit, with Regard to Dower, Wardship, Uses, prescriptions, and other Matters, as any one may see in the other Chapters of the Acts of the aforesaid Parliament. And about the same Time, to wit, while the Parliament sat at *Merton*, a most grievous Complaint was made, which I cursorily Notice, by *Robert Capito* (a) (*Greathead*), Bishop of *Lincoln*, of that Law of *England*, which excluded Persons, thus born before Marriage, from the Privilege of Legitimacy, the same Bishop strenuously endeavouring to shew * from the Canon, Natural, Divine, and Imperial Laws, that the aforesaid Law, ought to be necessarily abolished. This he attempted in his Letters to (b) *Walter de Ralegh*

* Robert. Grof. fereft. Epif. Lincoln. Epift. 23. Mfs.

(a) *Greathead*, born according to some at *Stradbroke* in *Suffolk*, according to others at *Stow* in *Lincolnshire*, was a Prelate of great Learning and Eminence.

He was wholly bent upon following what appeared to him reasonable and just, had little regard to the Circumstance of the Times, or the Quality of the Persons, and opposed equally, the King's Will, and the Pope's Pleasure, according as it happened. — He was the great Patron of *Roger Bacon*; and having been Bishop of *Lincoln* near twenty Years dyed at *Bugden* the 9th of *October* 1253.

Rapin. 8 Ed. V. 3. p. 524. — *History of Lincolnshire* p. 1466. *Tanner.*

(b) *Walter de Ralegh*. Selden styles him *Tribunalis regii præfident*, but I don't meet with any Judge of that name, much less presiding at that time in any of our Courts of Justice — We find indeed that a Proclamation having issued in 1234. to declare the Outlawry against *Hubert de Burgh* void, Judgement was pronounced thereon at *Gloucester*, by the Mouth of *Dom. W. de Ralegh*, (but whether *Walter* or *William* don't appear) in the Presence of the Archbishop, Bishops, Earls and Barons. — *Additions to Mat. Paris.* p. 153.

There was also one *William de Ralegh* a Justice of the Com-

leigh, Lord Chief Justice of the King's Bench, whom he earnestly exhorts to exert himself to the utmost of his Power, that the aforesaid Law might be altered here. He tells him also that he had been informed, that it was an old Custom among the *English* to consider such Children as legitimate, and that, as a Sign or Simbol of their being so, they were put, during the Solemnity of the Marriage, under a Cloak, or other Covering thrown over the Parents, from whence being at that Time taken, they were to be regarded as newly born, therefore born in Wedlock. His Words are these—*Et ut seniorum relatione didici, consuetudo etiam in hoc regno antiquitus obtenta et adprobata tales legitimos habuit et hæredes, unde in signum legitimationis nati ante Matrimonium consueverunt poni sub pallio super parentes eorum extento in Matrimonii solemnizatione.* — And as I have learned from the Relation of antient Persons, there was even in this Kingdom, an antient and approved Custom, by Virtue of which such were held as legitimate and capable of being Heirs; and that Children born before Marriage were, as a Sign of their Legitimation, usually put under a Cloak extended on their Parents during the Solemnization of their Marriage. — That is whilst

mon Pleas in 1228 the 13 H. 3. and a Justice in Eyre in 1231. *Dug. Orig.* — And likewise one *William de Ralegh* who was elected Bishop of *Norwich* in 1239, and afterwards translated to *Winchester*.

The Parliament was held at *Merton* the 23d. Jan. 1235. the 20th. Hen. 3d.

• Robert. Gros-
setest. Ep f. Lin-
coln. Epist. 24.
Mss.

whilst they were joined together in Matrimony. But *Raleigh*, as appears from the Bishop's* next Letter to him concerning the same Matter, rejected all this as insignificant.—*Præterea ad confirmandam banc Legem quod Bastardus sub pallio supra parentes nubentes extento positus surgit Bastardus, induxisti Testimonium Richardi de Lucy cujus Testimonium quantam et qualem habeat Comparationem ad Testimonia divinæ Scripturæ et Canonice contrarium testificantia lippis patet et tonsoribus.*—Moreover, says he, in Confirmation of the Law, that a Bastard, put under a Cloak extended on their Parents during the Solemnization of the Marriage, arises a Bastard, you have produced the Authority of *Richard de Lucy*, (a most eminent Justiciar of *England* under the Reign of King *Henry* the second, between whose Testimony and the Authority of the holy Scriptures, and that of the Canon Law bearing Witness to the contrary, how great and what kind of Disproportion there is, is manifest to the meanest Capacity:—For my own Part, I could never find that any such Custom ever prevailed among our Ancestors at any of their Nuptials, much less that a spurious Birth was thereby rendered legitimate. But I remember to have somewhere read of this very Ceremony being practised when the Children of *John* of Gaunt, Duke of *Lancastre*, begot before Marriage on *Catherine* his third Wife, were legitimated by the Par-

Parliament * in the Reign of *Richard* the second, and that some Regard was paid to this Custom in that very Assembly. To what we have already said of the public Averſion to the imperial Laws here, during the Interval we are ſpeaking of, may be added, that in the Reign of *Edward* the firſt, a moſt weighty Queſtion aroſe, with Regard to the highly memorable Deciſion at *Norham* * in the Province of *Durham*, concerning the Succeſſion to the Kingdom of *Scotland*, by what Kind of Law, the Matter in debate ſhould be determined; to wit, whether by the *Engliſh*, *Scotch*, or by the *Imperial*, as by the Law of Nations, when the Competitors where to be heard in Form, before the King of *England*, at that Time Lord Paramount of *Scotland*. And at laſt the whole Aſſembly unaniſmouſly declared, that no Uſe at all of the Imperial Law ſhould be permitted in the Diſcuſſion of that Point, leſt any Diſguſt ſhould thereby be offered to the Crown of *England*. Thus much, among other Things, I have formerly taken out of an old Manuſcript bearing the following Title.—*Quomodo Edwardus Rex Angliæ conſtituit Joannem de Balliolo Regem Scotiæ*—The Manner of *Edward* King of *England*'s conſtituting *John Baliol* King of *Scotland*. For at that Time *Roger de Brabançon*, as the Author of the above Treatiſe tells us, pronounced in the aforeſaid Place Sentence in the King's Name. And that Ediſt of King *Edward* the ſecond, by which all Authority was in
this

* Rot. Parl. 20.
Ric. 2. num. 28.

* Anno 19. Ed.
1. ſeu. 1292.

* Dorf. Claus. 13.
Ed. 2. membran.
b. in Scheda.

* Rot. Parl. 11.
R. 2. Et. videtis.
Not. in Fortesc. p.
41. adde Placita.
coram Rege Mic.
8. H. 4. rot. 72.
Case. Pedington
& Otterworth.

* Joan. Fortesc.
de laud. legum
Angliæ c. 33. &
34.

this Nation denied to public Notaries created by the Emperor or by his Counts Palatine, certainly in some Measure concerns this Point. The Words as we find them in our public Records, * are — *eo quod regnum Angliæ ab omni Subjectione Imperiali sit liberrimum.* — Because the Kingdom of England is wholly free from every kind of Subjection to the Roman Empire. — Wherefore we have all the Reason in the World to believe that even during this Interval, those at the Helm here had the very same Sentiments which King *Richard* the second, and his Nobles manifested in Parliament. For it is by their Command inserted in the public Records, * *Que le royaume (a) d'Angleterre n'estoit devant ces heures ne a l'entent du Roy nostre dit Seignior et Seigniors du Parliament unques ne serra rule ne gouverne per la ley civil.* — That the Realm of England hath never been unto this Hour, neither by the Consent of our Lord the King, and the Lords of Parliament, shall it ever be ruled or governed by the Civil Law. — And I am still at a Loss to find out what could induce *John Fortescue*. (b) Chief Justice * under King *Henry* the sixth, to write that some Kings of England, not at all pleased with the Laws of their own Nation — *leges civiles ad Angliæ regimen inducere et patrias leges repudiare fuisse conatos* — endeavoured, on that Account, to bring the En-

(a) See *Selden's Janus*, p. 68. *Epinomis* 19.

(b) See *Selden's Notes on Fortescue*, p. 40.

English Nation to be governed by the Civil Law, and to lay aside those of their own Country. — I have no where read that any of our Kings acted thus. He indeed assigns a Reason for their doing so, to wit, for the Sake of the royal Law, which we have before spoke of. But at the same Time where is it to be found that any of our Kings behaved in that Manner? As to what we find in *Joannis Sarisburiensis* * — *Nullas leges credidisse aliquos civilibus præferendas* — that some were of Opinion no Laws were preferable to the Civil — in which that concerning the absolute Power of the Prince contained in the royal Law deserves especial Notice, is meant of some of the Flatterers of the Hieratical Order in that Age, not of the *English* Nation, or any others who were at that Time Judges here. And we must not pass by, that even the penal Laws prescribed by King *Richard* the first, (who was likewise looked upon as the Author of the Oleronian,) with Regard to the Management of his Navy, greatly differed from the Imperial Laws. Neither can any thing relating to those Laws be found in the Registers of the Commanders of his Fleet, a Copy of which is preserved in the Words of *Roger Hoveden*, * and *Matthew Paris*. † So that the Imperial Law was not then at least in the Discussion of Marine Affairs made Use of among us.

* *Joan. Sarisbur. Policrat. l. 7. c. 20.*

* *Rog. Hoveden Ann. pt. 2. p. 666* Edi. *Franckfort.*

† *Mat. Paris an. 1190.*

S E C T. III.

The singular Esteem the *English* set on the Laws of their own Country, usually called the Common Law, as well as their resolute Adhesion unto it, in the Management of public Affairs, permitting at the same Time the Use of the Imperial Law, tho' not without restraining it within very narrow Bounds.

We shall treat by the Way, of the Names Clerk, Clericature, and **Clergie.**

TH E Singular Esteem our Nation shewed, during that Interval, for the *English* Law, or that of our Country called the Common Law, and their (a) Adhesion unto

(a) *Their Adhesion unto it.* The Clergy, finding it impossible to root out the Municipal Law, began to withdraw themselves by degrees from the temporal Courts, and the Study and Practice of it devolved of course into the Hands Laymen; and the peculiar Incident of the Court of *Common Pleas*, the grand Tribunal for Disputes of Property, being fixed by *Magna Charta* to be held in some certain Place (which in consequence thereof has been held in the Palace of *Westminster*) brought together the Professors of the Municipal

unto it, sufficiently appears from the Articles and Pleas of the Crown, and other like public Acts; Specimens of this Nature in the Reigns of King *Henry* the second and *Richard* the first, are at this Day to be seen in *Hoveden*, (a) and *Matthew Paris*, as well as in the Writings of our Lawyers, who flourished at that Time, but more especially in the public Records of all Kinds, during this Period. The same may be inferred from the solemn Oath usually taken by the Judges in those Days. The before mentioned *Joannes Sarisburiensis*, speaking of the Reign of *Henry* the second,* says,—*Et quidem Judices sacramento legibus al-*
nicipal Law, who before were dispersed about the Kingdom, and formed them into an aggregate Body.

* *Joan. Sarisbur.*
Polycrat. l. 5. c.
 12.

By this means a Society was established of Persons, who (as *Spelman* observes) addicting themselves wholly to the Study of the Laws of the Land, and no longer considering it as a mere subordinate Science for the Amusement of leisure Hours, soon raised those Laws to that pitch of Perfection, which they suddenly attained under the Auspices of our English *Justinian*, King *Edward* the 1st.

In Consequence of this lucky assemblage, they naturally fell into a kind of Collegiate Order, and, being excluded from *Oxford* and *Cambridge*, found it necessary to establish a new University of their own. This they did by purchasing at various Times certain Houses (now called the Inns of Court and of Chancery) where Exercises were performed, Lectures read, and Degrees were at length conferred in the Common Law, as at other Universities in the Canon and Civil. The Degrees were those of Barristers (first styled Apprentices from *Apprendre*, to learn) who answered to our Bachelors; as the State and Degree of a Serjeant, *Servientis ad Legem*, did to that of Doctor.

Black. Introduc. 19, 20, 22, 23.

(a) *Roger de Hoveden*.—Chaplain sometime to *Hen.* the 2d.—He deduced our History from *Bede* to 1202 the 4th of King *John* and is esteemed a very diligent Writer.

Whear. Nicholson. Rapin.

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iligan-

ligantur jurati, quia omnimodo judicium cum veritate et Legum observatione disponent.—The Judges indeed are bound by their Oath to maintain the Laws; so that they are in all Cases to give Judgment according to Truth and Observance of the Laws.—Which Words, though they may seem to be taken from *Justinian*,* yet must, being spoken by an *Englishman* and in *England*, be understood of the Laws of our Country, or of our Common Law, that is, *Legibus Angliæ et consuetudinibus relictis*.—

* C. tit. de Judiciis L. 14.

* Mat. Paris circa Initium Richardi primi. &c.
† Joan. Sarisbur. Policrat. l. 5. c. 16.

of the Laws and good Customs of *England*—which was the Phrase of those Times.* Concerning which the same Author elsewhere acquaints us †—*Sed et leges ipsæ et consuetudines quibus nunc vivitur, insidiæ sunt et laquei calumniantium. Verborum tendiculæ proponuntur, et Aucupationes Syllabarum, vel simplici qui syllabizare non novit.*—

That the very Laws and Customs, under which we at this Time live, are, in the Hands of the Litigious, as Snares and Traps, the Words therein being so managed, as to entangle, and the Syllables so disposed, as to catch the very simple, who are unable to spell.—And the Form of the Oath likewise taken in those Ages by the Judges appointed for the public Management of Affairs, whether they were Ecclesiastics or Laymen, expressly contains—*se judicatueros secundum legem et Consuetudinem Regni*—that they would judge according to the Law and Custom of the Kingdom—as appears from the Oath which the Judges, who

who were constituted to administer public Justice in the Reign of *Henry* the third, took according to Custom. Some of the Words of the Oath are as follow,* — *Bonâ fide procurabunt quod Magnus sicut parvus judicabitur secundum legem et Consuetudinem Regni.* — They shall sincerely endeavour, that Justice be administered to Rich and Poor according to the Law and Custom of the Kingdom.—Which, in my Opinion, was added on Purpose to prevent (a) their making any Determination whatsoever according to the Imperial Law then lately brought among us, which, doubtless some, especially of the Hieratical Order, were extremely fond of, and preferred to the *English* Law. Whence that common Form of Speech, *Lex terræ*—the Law of the Land—was in every one's Mouth, by which, as well as under the Name *Legis et Consuetudinis regni*—of the Law and Custom of the Kingdom—the Law we were to live under, and according to which, Justice was to be distributed unto us, was more expressly pointed out, and every way both distinguished and discriminated from *lege Cæsarea*—the Imperial Law—then vulgarly and simply called, by us, the Civil Law. Wherefore in *Magna Charta*,* and elsewhere, special mention is, with Regard to this Mat-

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ter,

* An. 1257. f. u.
41. H. 3. In Annual.
Burtonensis
bus Mis.

(a) See *Black. Introduc.* p. 20. There is an Entry on the Clause Roll of the 18. *Hén.* 3d. M. 19 of the Oath to be taken by the Judges. See *Pryn's Animad.* p. 38.

• Mat. Paris. an.
3217. feu. 17.
Jehan, R. &c.

ter, designedly made, *Legis terræ*—of the Law of the Land—and in those great Differences between King *John* * and his Nobles, *legum antiquarum et Consuetudinum Angliæ*—of the antient Laws and Customs of *England*. — Our Ancestors, with a View of excluding, in Matters of public Government, the Use of other Laws, consequently of the Imperial, (a) which at that time in a Manner threatened the *English*, make Use of Words much like the foregoing. We meet likewise, during that period, as well as after, both in the Oaths taken by our Kings at their Coronation, and in the Laws enacted by them, with expresse Words to the same Purpose; by which it appears, that the Imperial Law, however now and then applied among us, was, in Matters of public Government, of no manner of Authority in this Nation. And 'tis doubtless from what has been said, the less to be wondered at, that in the Courts proceeding according to the *English* Law, the Use, such as we have before shewn to have been made of the Imperial Law, at last wholly disappeared. But this was the easier effected, because, about the very Time that the Use of the aforesaid Law was entirely laid aside, an End was likewise put to another Custom among us, to wit, that of appointing Bishops, Abbots, Deans, and such like Persons of the Hieratical order, to be the King's Judges. For from that Time, scarce any, or none indeed of that Order, the most eminent Part of

(a) *Imperial.* See Lord Littleton's Notes to the first Book of the Life of H. 2d, p. 518.

which usually applied themselves in the Universities to the Study of the Imperial and Pontifical Laws, sat in *England* as Judges in the aforesaid Courts, (except in that of the Chancery) yet the Officers of those Courts, and others considerable in the Management of public Affairs, were usually, even then, and for a long while after, chosen out * of that Order; on which Account perhaps, the Officers of the same Courts, and others of that kind, none of which for some Ages have been Ecclesiastics, are still styled (*a*) *Clerks*. Now tho' the Name of *Clerk* and *Clericature*, was in the early Ages of Christianity, * as well as by Ecclesiastical Writers, only made Use of to signify those who exercised the Offices of Religion in Matters of divine Worship, as well as to be expressive of their Dignity, in which sense the Words are to this Day commonly retained,* they are nevertheless likewise employed, both by the antient and modern *French* and *English*, to signify Persons eminent in any kind of Learning or Science; as in Philosophy, Mathematics, History, Civil Law, drawing up of Forms, and such like Matters, and are not confined to Divines, or to those of the Hieratical Order alone. Hence the very Word *Clergie*, is taken for Science itself, or for Learning in general, and *Clericus*—*Clerk*—for a skilful and learned Person. In this Sense, the *French* * make Use

* Vid. Henric. Spelman in Epist. Dedicat. ad Concil. Eccles. Brit.

* L. 2. Cod. Theod. tit. de Episcopis et Clericis. Justin. Novel. 123. Isidor. Orig. l. 7. c.

* Vid. Lindwood ad tit. de Temp. Ordinand. C. quia quidam Verb. Clericum.

* Pasquier des Recherches de la France lin. 8 c. 13.

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(a) See *Black. Introdue.* p. 17.

* Mss. in Biblio.
Cottoniana

of the Words, *Grandclerc*, (*a*) *Beauclerc*, *Mauclerc*, as well as the Words *Clergie*, and *Grand Clergie*, for consummate Learning. And there is extant a Fragment * of a very antient Manuscript, wrote in *French Rhymes* intituled — *il livre de Clergie en Romaunz*, *ki est appellez le ymage del monde* — the Book of Science in Romance, called the Image of the World — which, except a few things just touched upon concerning the Creation, contains nothing but what relates to Astronomy, Geometry, and the other liberal Arts. And the Title of the sixth Chapter of the first Book is as follows — *De trois manieres de genz ke li philosophie poseront au monde, e coment Clergie vient en Fraunce*. — Of the three Kinds of Persons, who introduced Philosophy into the World, and how Learning was brought into *France* — that is, how Learning and the liberal Sciences first came into that Nation. And in another Place,

*Ki bien veult entendre cest livre
E savoir coment il doit vivre
E appendre tiel Clergie
Dunt meuz naudra tut sa vie, &c.*

Hence our King *Henry* the first, was called *Belloclericus*, or (*a*) *Beau Clerc*; and the antient *Greek* Philosophers are by *Geofrey Chaucer* stiled *Clerks*.

Some-

(*a*) *Beauclerk*. The Latinity of the Writers during the Reign of *H.* the 2d. was more pure than in many of the following Ages. *Observat. on the Stat.* p. 45.

Sometime in Greece that noble Region,
 There were eight Clerks of full great Science,
 Philosophers of notable Discretion, &c.

And he frequently in other Places speaks to the same Purpose — wherefore as there are, besides the Judges in all Courts and Consistories, some Officers, called Scribes, Notaries, and such like, who are in Offices which can't be discharged without some Share of Learning; so likewise there are others, named Doorkeepers, Beadles, Cryers, destined only to execute Orders, the Performance of which does not require any Learning. The first, not the last, were usually called Clerks, on Account of their Learning, Knowledge, or Art, whatever it was; which Name was likewise given to Amanuenses, and Writers of Epistles, and to the γραμματεῖς or *Scribe* among the *Ephefians*, mentioned in the Acts of the Apostles,* rendered in our *English Version Town Clerk*: this Version without Doubt having been made by the Hieratical Order, to whom above all others it properly belonged, and of which there was always a greater Number of Persons, eminent for every kind of Learning, or at least who passed for such, than among any other set of Men. Thus the Names *Chaldaean*, *Augur*, *Soothsayer*, and many others, are applyed to Persons, who in Truth, were the Originals consulted, would not be found to be at all expressed by them. But in fine, 'tis very plain, from

* Act. Apost. c.
 19. v. 35.

what has been already shewn, how it came to pass, that the Imperial Law was, as we have above related, reduced among us to those narrow limits, within which it is at present confined. What we have said of this Matter is abundantly sufficient.

CHAPTER X.

SECTION I.

Of the Age wherein the Author of *Fleta* flourished ; that he neither wrote his Work in the Reign of *Edward* the second, or third.

WE now return to *Fleta*. We are in this Place to consider the Time, when this Commentary was composed or finished by the Author, and to give some Account of his Name. We also willingly embrace this Opportunity of making an Observation, concerning that very remarkable Place in this Author, in which—*Provisio quædam omnium Regum Christianorum*.—A certain Provision made by all Christian Powers—relating to Royal Donations or Alienations, hitherto in my Opinion no where else

to

to be met with, is mentioned. Nothing can be plainer from this Writer's Preface, than that he composed this Work in the Reign of one of the King *Edward's*—*Quam in Subditis tractandis æqualis jugiter appareat, quam eleganter, &c. Edwardus Rex noster hostilitatis tempore, &c.*—How impartial, says he, in that Place, does our King *Edward* in the Time of War always appear in the government of his Subjects! How elegantly, &c.—But it is not plain from these Words, whether he wrote under *Edward* the 1st, 2d, or 3d. However 'tis evident that the King he refers to, was one of the aforesaid *Edwards*. That Passage in the Articles of the Crown and of the Eyre, in which Mention is made of *Edward*, Father of the King, seems to be a strong Argument, that this Commentary was not at least finished in the Reign of *Edward* the first—the Words follow * —*Qui receperint debita Regis vel partem Debiti et debita illa non acquietaverint tam de tempore Regis E. patris Regis quam de tempore præsentis.*—Such Persons as have received the King's Debts, or Part of them, and have not, as well in the Time of King *E.* Father of the King, (the Name of *Edward* being in the Manuscript no otherways denoted) as in the present Reign, given Acquittances for the said Debts—for the very same Article was likewise thus worded in the Reign of *Edward* the first,† *Qui ceperint debita Regis vel partem Debitorum*

* Flet. lib. 1. c. 20. S. 59.

† Capitul. Itineris in vet. Statut. impress. Londini. 12 June 1556. part. 1. fo. 156. b.

torum et debitores illos inde non aquitetaverint tam de tempore domini Regis Henrici quam de tempore domini Regis nunc.—Such Persons as have received the King's Debts, or Part of them, and have not, as well in the Reign of King *Henry*, as in that of the present Lord the King, discharged the Debtors from the same.—This Author then, if these are his Words, could not have wrote under King *Edward* the first, but must have composed this Work, either under *Edward* the 2d, or 3d, both those Princes having had an *Edward* for their Father; but of that Passage more by and by. Did he write then under *Edward* the third? Tis plain to me he did not; for he with great Exactness produces Matters contained in the Acts of Parliament of *Edward* the first, concerning Wrecks, Action of Dower, and other Affairs, as well as many more out of the Laws of *Henry* the third. But he no where at all mentions any Constitutions of *Edward* the third; which, had he wrote in any Part of his Reign, he certainly would have done. For Instance, about the beginning of * the Reign of King *Edward* the third, a Law was enacted relating to Convictions; for Actions brought for Perjury in our Courts, were by the Lawyers in that Age so called, being the same we now term Attaints; by which Statute the antient Law concerning such Actions, was so altered, that this Author doubtless would, where he so fully * and carefully treats of Convictions, had he

* Stat. 1. 1 Ed.
3, c. 6.

* Fle. li. 5. c.
22. Sect. 8, & 16.

he wrote after that Law was enacted, have given us an Account of such a Change; he speaking more than once of the aforesaid Convictions, as depending only upon the antient Law then in being. And the Act of Parliament in the Reign of *Edward* the first, § which according to his Explanation of it, ^{*3 Ed. 1. West. 1. c. 38.} was not to take Place except for the Perjury of twelve Men in Actions, concerning a Tenement, or things partaking of that Nature, and possessed by a perpetual Right, called in the Law Language a Freehold; nor even in those Cases, without the King's Leave. This Author even gives us a Translation of the Statute itself, where we read—*Concedit Rex convictiones quotiescunque sibi videbitur expedire*—instead of, as 'tis in the Language of that Statute—*Le Roy de son Office desormais donera attaints &c. quant il semblera que besoign soit.*—the King *ex officio* will from henceforth grant Attaints whenever it shall seem to him necessary.—But this is no proper Place for a Dissertation on the aforesaid Law, made in that Age. Whoever pleases may consult the Writers of our own Nation † who have more fully handled that Matter. We will here only make this Observation that the Author of *Fleta* takes no Manner of Notice of the Law, being about the Beginning of the Reign of *Edward* the third, as to the above Point, remarkably altered or explained, to wit, that an Attaint should lie for a Perjury of that kind in Actions of Trespass also, and that the Chancellor of *England* might grant it, by the lawful Authority

† Vid. Bract. l. 4. de Assisa Utrum c. 4 Britton, c. 97, 98. Andr. Horn. Mirror c. 4. f. 19.—c. 5. f. 1. para. 77.—See. 4. pag. 324. Cok. Instit. part. 2d. fo. 237. &c.

riety or in Virtue of his Office. It cannot be supposed that an Author, writing in the Reign of *Edward* the third, would have said nothing of this Law. The first Session of the Parliament, in which that Statute was enacted, was opened on the very Coronation Day of King *Edward* the third, to wit, on the Morrow of the Festival of the blessed Virgin, that is, on the third of *February*, but ten Days at most after the 25th of *January*, when the aforesaid King began his Reign. Our Author therefore could not have Time to write this Work under *Edward* the third, before that Law was enacted. Neither does he indeed, in that exact Treatise of his, relating to Convictions, take any Notice of the Act of Parliament made in the thirteenth Year of King *Edward* the second, called *de Attinctis*—of Attaints.—Wherefore it is manifest, there is no Reason to suppose that he wrote after that Time, or the Year of Christ 1320 ; nor does he so much as cite any of the Acts passed in the Reign of *Edward* the second. From whence indeed, if nothing appears to the contrary, we may fairly conclude, that this Author did not even write under *Edward* the second, but before his Reign. And the Difficulty arising from the Place above quoted—*de E. Patre Regis*—of E. Father of the King—is the only one I have met with ; yet that is not of weight enough to convince me, that the *Edward* mentioned in the Preface to *Fleta*, and consequently the very Monarch
in

in whose Reign he wrote, was not King *Edward* the first. The antient Copy of *Fleta*, from whence the printed Edition was published, and which I am apt to believe is the only one extant, seems to have been transcribed in the Reign of *Edward* the second, or perhaps in that of *Edward* the third. For it plainly appears from the Number of Errors, as well as from the many Chasms visible in the Lines of that Manuscript, as if in transcribing the same the Librarian was unable to read or understand it, that the aforesaid Manuscript was neither penned or revised by the Author himself. Wherefore it is highly probable, that the Librarian under *Edward* the second, carelessly or negligently substituted—*E. Patris Regis*, instead of *H. Patris Regis*—H. Father of the King, (that is, *Henry* the third, Father of *Edward* the first) or thus injudiciously adapted also those Articles of the Crown found in *Fleta*, to the Practice of the Courts in his Time. Whoever has compared the Statute enacted in the third † Year of King *Edward* the 1st, <sup>† 3. Ed. 1
I. c. 19.</sup> concerning his own and his Father's Debts, with that Article, and with the Words in which our † Author recites the same Law, <sup>† Flet.
33.</sup> will perhaps readily grant this. Especially as there are many other circumstances which serve plainly enough to discover, that this Commentary was wrote in the Reign of King *Edward* the first. We remark by the by, that there is, concerning the Time of the Author, a Mistake of that Nature, or a kind of a Gloss in the antient Manuscript of *Gilbert*

† Gilb. Thornton Mss. lib. 1. c. 19.

bert Thornton above-mentioned, in which we find these Words † — *Dari non poterunt aliter singulari personæ res quæ sunt spiritualibus annexæ sicut Corrodia et Abbatii et domibus religiosis percipiendi et hujusmodi in quibus nullus vendicare sibi poterit liberum tenementum, temporibus retroactis. Sed hodie per Statutum Regis Edwardi secundi fiat breve de Corrodio subtracto sicut de libero tenemento.* — Things annexed to spiritualities, as Corrodies to be received from Abbeyes and religious Houses, and such like, in which no one could in Times past claim a Freehold, were not to be granted to a single Person, otherwise (*than to be possessed, as by an Usufructuary, not as absolute Lord*;) but now by a Statute of King *Edward the second*, a Writ lies as well for withholding a Corrody, as for a Freehold.

† West. 2. 13. Ed. 1. c. 29.

— Thus a Statute of *Edward the second* is cited, when it is evident, that *Thornton*, as was before shewn, not only wrote, but even dyed in the Reign of *Edward the first*; and therefore could not be the Author of the above Passage. He might, it is true, have said by the Statute of King *Edward*, of *Westminster* the second, † that Law concerning Corrodies having been at that Time enacted, to wit, in the 13th Year of the aforesaid King. But these Words appear rather to have been a Kind of Gloss made by the Librarian, and that *Thornton* himself was not the Author of any of the Words after *poterit*; so far being taken out of *Bracon*, † (*a*) whom *Thornton*

† Bracon. l. 2. de acquirend. rerum Dom. c. 5. f. 7. p. 14.

(*a*) *Bracon's* Words end with *liberum tenementum*.

abridged : neither does the Word *poterit* at all agree with the subsequent Words, *temporibus retroactis*. Nor is it usual with *Thorn-ton* to insert the Laws of his own Time, he having throughout his whole Work assumed the Person of *Bracton*. But as to what relates to the Author of *Fleta*, it is certain, if the noble and vast Encomiums he in his Preface gives to King *Edward* are weighed, they cannot at all, with any shew of Reason, be well applyed to *Edward* the 2d ; and *Edward* the 3d, is quite out of the Question ; perhaps therefore such immense Praises ought to be referred only to *Edward* the 1st. But we must at the same Time make the following Remark on this Author's Preface, that it is almost from the very beginning to the End so composed, as that it rather seems to have been copy'd after some antient Form, and more than once attributed by other Authors before his Time to different Kings, than to have been in reality peculiarly meant of, or apply'd to, the King therein mentioned. Whoever compares this Preface, with that prefixed to the Book of the *Scotch* Laws, called *Regiam Majestatem*, as well as to the Work of *Ranulph de Glanvill's*, must readily grant this. For our King *Henry* the 2d, and *David* King of *Scots*, are, in different Prefaces, complimented almost in the very same Words, used by the Author of *Fleta* in this Preface to his King *Edward*. Wherefore such Encomiums, whatever they were, are not to be offered as of any Weight in this
Pre.

Preface, with regard to the Subject we are now treating of.

S E C T. II.

The Commentary of *Fleta* was penned under *Edward* the first.

BUT there are in other Places of the Work itself, very express Footsteps of the Time of its being penned; from whence it plainly appears that the *Edward* mentioned in the Preface, or the King, in whose Reign the Author wrote, was *Edward* the first. First he † speaks of the Privileges of Knights Templars, as far as the Law enacted under *Edward* the first, † concerning erecting Crosses, relates to their Privileges, as of an Order, which, as well as that of the Knights Hospitallers, flourished at the Time of his writing; but every one, who is not quite ignorant both of our Law and of all History, knows that the Order of Knights Templars was about the Beginning of the Reign of King *Edward* the 2d, wholly abolished. Secondly, in the Place where he gives us the † Form of the King's Writ, called *Moderata Misericordia*, founded on *Magna Charta*; † He, adapting the Words to his own Time, frames it in the King's Name thus—*Contra tenorem Magnæ Chartæ*

† Flet. 1. 2. c. 50. f. 16.

† West. 2. 13. Ed. 1. c. 32.

† Flet. 1. 2. c. 66. f. 26.

† Mag. Chart. c. 14.

tæ Regis H. Patris nostri in qua continetur quod nullus liber Homo amercietur, &c. —

Contrary to tho Tenor of the *Magna Charta* of King *H.* our Father, which declares that no Freeman is to be amerced, &c. — None but *Edward* the 1st, as being the Son of *H.* the 3d, can be meant in this Place. ^{† Flet. l. 2. c. 64. f. 1.}

Thirdly, says he, *† Dominus Rex nuper in Parlamento suo apud Acton Burnell habito, &c.* — Our Lord the King, lately in his Parliament at *Acton Burnell*, &c. — That

Parliament was held in the 11th Year of *Edward* the 1st, and — *Dominus Rex* — our Lord the King — was the usual Form to denote the King then upon the Throne. Fourthly also, he in the Chapter above cited says,

— *per formam † Statuti Regis anno Regni* ^{† Flet. l. 2. c. 64. f. 7.}

Regis — by Form of the Statute of the King, enacted in the Year of his Reign — (the 13th through Negligence of the Librarian being omitted) at *Westminster*, manifestly pointing at the Statute of *Edward* the 1st, intituled — *de Mercatoribus* — of Merchants.

Fifthly, he expressly informs us, that King *Henry* the 2d, was great Grandfather of that King, in whose Reign he wrote, and every one knows, that he was the Great Grandfather of *Edward* the 1st, that is, Father of King *John*, who was Father of *Henry* the 3d, who was Father of *Edward* the 1st: to

wit, *†* in that Chapter of the *Magna Charta* of *Henry* the 3d, — *de Scutagio * capi-endo sicut capi consuevit tempore Henrici Regis Avi nostri* — of the taking Escuage as it

S

had

^{† Flet. l. 2. c. 65. f. 16. * Mag. Charta c. 37.}

had been usually taken in the Reign of King *Henry* our Grandfather, by which Name 'tis evident *Henry* the 2d is meant. Our Author reciting that Law in his own Words says—*Inbibetur, quod nullus distringatur pro Scutagio, sed capiatur sicut capi consuevit tempore H. Regis. Proavi Regis nunc*—'tis forbidden that any one be distrained on for Escuage, but that it be taken as it used to be in the Reign of King *Henry*, his present Majesty's great Grandfather.—He preserves the very Sense of the Law of *Henry* the 3d, as far as it relates to *Henry* the 2d, Grandfather of that King *Henry*; at the same Time rightly calling the aforesaid *Henry* the 2d, great Grandfather of his King, that is, *Edward* the 1st. I know indeed some very eminent Men, * have been of another Opinion, and by misunderstanding some of the Places we have cited, judged that the Author of *Fleta* flourished in the Reigns of *Edward* the 2d and 3d. But I am fully convinced, by what has been before quoted, that this very Book was wrote in the Reign of *Edward* the 1st; and that therefore both it, as well as the Sum of *Thornton*, and the Compendium, called *Britton*, were some of the Works compiled by the most famous * *Lawyers*, at the Command of *Edward* the first.

* Coke. in Prefat. ad part. 8. Relat. alibi. Co. well in Interpret.

* 35. H. 6. pl. 42. a.

S E C T. III.

Why the Author of this Commentary was called *Fleta*.

WE shall now examine how this Book came to be called *Fleta*. We find indeed among the Writers of Britain,* an Author called *William Flete* or *Fleta*, commonly by Foreigners styled *Anglus* or *Anglicus*—the *Englishman*; but this Person was a Divine of the Order of the Hermits of St. *Austin*, and wrote only upon Theological Subjects: It is also manifest that this Work, intitled *Fleta*, was penned before his Time, he having flourished under *Richard* the 2d. But our Author plainly assigns us, in the following Words of his Preface, the Reason of his Book being called *Fleta*. — *Tractatus iste qui merito Fleta poterit appellari, quia in Fleta de jure Anglicano conscriptus est, in tres partes dividitur principales*——This Treatise, says he, of the *English* Law, divided into three general parts, may, from its having been wrote in the *Flete*, justly be named *Fleta*. — Now by the Word *Fleta* here, is meant that most noted Prison, which we, from the little River running by it, call the *Fleet*; for the *English* call *Fluvius Fluctus seu Æstuarium* —— a River, Flood, or

* Dal. Cent. 6.
Script. 41. Pit.
zeus. æt. 14.
Script. 643. an
1380.

* Sebastian. de
Ceuvaruvia in
Thesaur. ling.
Castellanæ.

Place where the Tide comes in, *Flete*. Whence, as the *Spaniards* (according to * some) by Metonymy call *Naulum* a Flete from a River or Flood, on which the vessels sail, from which likewise their Words *Fletador*, and *Fletamiento*, are derived; the aforesaid Prison, as well as a Number of Ships, and the Street adjoyning to that small River, is on that Account, named by us *Flete*. Certainly if *Cicero* had called his *Tusculan Questions Tusculum*, he had done it for the same Reason as our Author named his Book *Fleta*; upon the same Account also, *Ovid's Books de Ponto* bear the Title of that Place. And it was a common Custom in the Age, in which the Author of *Fleta* flourished, as well as before his Time, to style public Writings and Acts, from the Place where their Contents were transacted. Thus the Constitutions of *Clarendon* (a) are called so from that Place. The *Magna Charta* of King *John*, the Charter of *Runningmede*, (b) from its having been signed there. Some Statutes also in the Reign of

Ed-

(a) *Clarendon*, called so from the Parliament being then held at *Clarendon*, a noble House, about two Miles north of *Salisbury*, at that Time belonging to the Crown.

These Constitutions were made in 1164. 10 H. 2d. and contain the chief Prerogatives and Privileges that were claimed as well by the King as the Clergy; they are divided into sixteen articles, and may be found in several of our Historians.

(b) *Runningmede*, a large Meadow between *Windfor* and *Stanes*, and denominated so, (according to *Mathew of Westminster*) as signifying *pratium Consilii*, because he says it had heretofore been frequently used for holding great Councils of the Realm.

Edward the 1st, are named, as even Novices know, the 1st, 2d, 3d, and 4th, of *Westminster*, from their having been enacted there: not to mention the Statutes of *Gloucester* and *Exon*, so called, on the same Account. But although it is no where that I know of to be found who was the Author of this Commentary wrote in the *Fleet*, yet there is no doubt, but that he was one of those who were sent to Prison. We are certain that a great many of the Judges, under *Edward* the 1st, very great Men indeed, and most eminent Lawyers in that Age, being justly convicted of Bribery, and of deciding Matters in their own Favour contrary to Law, were, as well as some others, besides the Officers of the Courts, justly punished by Fines, Banishment and Imprisonment; and it is probable, our Author was one of this Number. The Names of those adjudged guilty, are to be seen in the Works of our Annalists.* And I have by me an antient Manuscript of Annals, relating to the Year 1288, intituled *Incarceratio Justitiariorum domini Regis scilicet Thomæ de Weylond, Johannis de Lovetot, Willielmi de Brampton, et Adæ de Stratton de quo Dominus Rex habuit quadraginta mille marcas et amplius præter vasa argentea et aurea.*—The Imprisonment of the Justices of our Lord the King, to wit, of *Thomas de Weylond, John de Lovetot, William de Brampton*, and *Adam de Stratton*, from whom alone, our Lord the King took upwards of 40000 Marcs, besides Gold and Silver Plate.

* Vid. ex vet. Mss. Holinshed et Joan. Stowæ. um anno, 1289.

And in a Manuscript of *Peter de (a) Langtoft*, an old rhyming Chronographer, we meet with what follows, concerning the aforesaid Justices and others,

*Quant le Roy Edward avoit demore
Troiz annex de la mer Dieu l'ad remene
A son repoir trova par plainte presente
Ses Justices et ses Clerks attaintz de faufete.
Les Uns avoient, par douns, les ieys destourne.
Les autres la coroune avoiente viole ;
Thomas de Weylaunde en banc primes nome
Par agard du Court le Reigne ad forjure.
En la terre de France sans repaire est ale,
Ses Compaignons, ses Clerks sunt pris e mene
A la toure de Londres, deliveres par mene ;
E sur ceo chescun de Office est pryve.
Elys de (a) Begyngham nest pas entecbele
Et Johan de (b) Metingham le chef est demore,
Sire*

(a) *Peter de Langtoft*, so called from *Langtoft* in *Yorkshire*, was a Canon Regular of *Bridlington* in *Yorkshire*, and there dyed about the beginning of the Reign of *Ed. the 2d.*

Hearn. p. 22.

He wrote in *French Rhyme* and began his History at the Origin of the *Britains*, and continued it down to the End of the Reign of *Edw. the 1st.*

Rob. de Brune, who was Canon of the Priory of *Bourn*, in *Lincolnshire*, and dyed in the Reign of *Ed. the 2d.* translated *Langtoft* into *English Rhyme*, but as his Version, is not so intelligible as the Original, I have not inserted it.

See *Brunes Translation of Langtoft* published by *Hearn. v. 2.*

(a) *Elias de Begyngham*. He was one of the Justices of the Common Pleas.

(b) *John de Metingham*. He succeeded *Sir Thomas de Weyland*. These are the only two, among all the Judges of that Time, whom Historians have taken Notice of as free from Bribery and Extortion; and their Names will be conveyed down with Honour to the latest Ages.

*Sire Rauf de Hengham ad taunt dispute
Ke du Baunc le Roy perdu ad le see.*

*Sire Adam de (c) Stratton est dur demene,
Ieo cray ke sauns deserte nest il pas blame
Or, Argent, sans noumbre au Roy ad il done,
Avoir chaunta pur luy placebo Domine,
Dilexi quoniam fraude et faufete.*

And its scarce to be doubted, but that among the great Number of Lawyers found guilty, some of them were sent to the *Fleet*; that Prison being, preferably to all others, and that by a most antient Privilege, made Use of by our highest Courts of Justice—— Should any one deny our Author to have been of that Number, I shan't dispute the Point with him.

(c) *Adam de Stratton.* He is said to have been Chief Baron. Besides the abovementioned, there were also censured and fined, *Robert Lisbury*, Master of the Rolls, *Roger de Leicester*, a Justice of the Common Pleas, *Solomon Rochester*, *Richard Boyland*, *Thomas Soddington*, *Walter Hopton*, and *William de Sabam*, Justices Itinerant, and *Henry Bray* Escheator and Judge of the Jews. *Daniel's Hist. Eng. p. 189.*

S E C T. IV.

Of the Provision mentioned in this Commentary to have been ordained by all the Christian Powers, concerning Alienations made by Kings.

NOW the very remarkable Passage we have taken Notice of in this Author, and at which I am amazed, is to be met with where he treats of Donations, and is as follows. † *Res quidem Coronæ sunt antiqua maneria Regia, Homagia, Libertates et hujusmodi, quæ cum alienentur, tenetur Rex ea revocare secundum Provisionem omnium Regum Christianorum apud Montem Pessoloniam, anno regni Regis Edwardi Filii Regis Henrici quarto habitam.* — The Possessions of the Crown consist of the antient Royal Demesnes, Homages, Liberties and such like, which were they alienated, the King, according to the Provision made at *Mompelier* by all the Christian Powers in the fourth Year of the Reign of King *Edward*, Son of King *Henry*, would be obliged to revoke them. — There are other Passages in our Author,* concerning Royal Alienations, agreeable to what he here advances. But is this matter of Fact? Was any Provision by all the Christian Powers, relating to the revoking the Alienations of the Patrimony of Princes, made at that Time

† Fle. 1. 3. c. 6.
1. 3.

* Fle. 1. 1. c. 8.
in initio. c. 17.
f. 17. et vjd. Co-
wel. Institut. 1.
2. tit. 8. in prin-
cipio.

at Mons Pessulanus, a famous City of Languedoc, now called *Mompelien*? For it is my Opinion, that in this Passage, *Mons Pessolonia* can't be understood of any other Place; the City itself being sometimes called *Mons Pullerius* and *Mons Pisciculanus*, and by other Names, according to the different Fancies of Authors. That fourth Year of *Edward* the 1st, in which the Author of *Fleta* affirms such a Provision to have been made at *Montpelier*, corresponds with part of the Years after Christ 1275, and 1276. The aforesaid King *Edward* having began his Reign the 16th Day of *November* 1272, the Assembly of all Christian Princes, or their Ambassadors for that Purpose, must have been held there between the 16th of *November* 1275, and the 16th of the same Month in 1276. The following are the Christian Princes who reigned at that Time, to wit, *Michael Palæologus*, Emperor of the East—*Rodulphus* the 1st, Emperor of the West or *Germany*. — *Philip* the Hardy, King of *France*—*Alfonfus* the 10th, that great Astronomer, and Author of the *Partites*, King of *Castile* and *Leon*—*Alexander* the 3d, King of *Scotland*—*Uricus* the 8th, King of *Denmark*—*Boleslaus*, King of *Poland*—*Vladislaus* the 4th, King of *Hungary*—*James* King of *Aragon*—*Ottocarus* King of *Bohemia*—*Charles* King of *Sicily*—*Hugh* King of *Jerusalem*, besides others less considerable, who were then styled Christian Princes. But I am of Opinion there cannot be met with, except in this Place, either

ther in any Annals, Histories, or elsewhere, the least Shadow or Footstep of such an Assembly being held there, by the above Christian Princes, or by any other; or that they sent thither any Ambassadors to treat of such a Matter. It is certain the Emperor *Rodulphus* the 1st, made about that Time, and according to some, in the Year 1275,* a Cession, to Pope *Gregory* the 10th, of *Bononia*, and all the very extensive adjacent Possessions, till that Time, a valuable Part of the *Roman* Empire; but Writers are not agreed about the Year itself. Nothing however can be more manifest, than that this Donation was made about that Time. The like was at different Periods practised as well by succeeding, as well as preceeding, Emperors, whose Cessions were never revoked. It is true, some Things concerning this very Matter, or the revoking the Alienations of Royal Patrimonies, are, several Years before the 4th of King *Edward* the 1st, to be met with in the Antients. A memorable Rescript* of Pope *Honorius* the 3d, directed to the Archbishop of *Cologne*, about the Year of Christ 1220, relating to Alienations made by *Andrew* the 2d, King of *Hungary*, is, with regard to the same Point, extant. The Opinion also of that great and antient Lawyer *Azo*, who dyed long before the 4th Year of *Edward* the 1st, is cited from his Disputations,* and does not much differ from the aforesaid Provision. And we find in

* Vid. Aventin. Annal. Boiorum, lib. 7. Gordon Chronic. Anno. 1275. Paul. Langium Chronic. 1273. Durand. Specul. tit. de Rescript. present. f. 9 Num. 18,

* Extr. tit. de Jurejurando. c. 33. intellecto. Et. videbis quintam Compilationem Decretalium lib. 2. tit. 15. cap. 3. Et ibi, Innocent Cyron,

* Azon. Disputation. cujus initium An Dominus Rex apud Renat. Choppin. 1. 2. tit. 1. f. 6,

in the *Alphonfins*,† published about twenty-five Years before the 4th of our *Edward* the 1st, something to the same Purpose, as well as in the Body of the *Gregorian* Decretal, * set forth thirty-six Years, or thereabouts, before the aforesaid Year of the same King *Edward*, not to mention the Writers who handle this Matter, and flourished before that Time. Our *Bracton** likewise, treating of Royal Donations, is of the same Opinion. We may to the aforesaid Authors, add *Matthew Paris*, *William* of (a) *Newburgh*, and other Writers in the Beginning of the Reign of *Henry* the 2d; but altho' many Lawyers after that Year, or the Time in which the above Provision is said to have been made, with the greatest Application, canvassed and treated of this Matter; yet I could never find that any of them ever made the least mention of the aforesaid Provision. In the Compendium of our Law called * *Britton*, and wrote not very long after the aforesaid Year, as well as in † *Thornton*, who within sixteen Years of the 4th of the Reign of *Edward* the 1st, published his Sum, Royal Donations are expressly treated of; yet there is not in either of them one Syllable of any such Pro-

† *Alphon. Partit.* 2. tit. 1. l. 8.—et *Part.* 3. tit. 18. l. 29.

* *Decret. Gregor.* tit. de jure-jurando c. 33.

* *Bract.* l. 2. de acquirend. rerum Dominio c. 5. f. 7. fo. 14. a. & fo. 37. a. et vid. c. 24. f. 2. &c.

* *Britton.* c. 34. des Doncs. fo. 87. b.

† *Thornton.* lib. 1. c. 19. Mss.

(a) *William* of *Newburgh*, so called from a Monastery in *Yorksire*, whereof he was a Member. His History begins with the Death of *Henry* the 1st, and ends at the Year 1197. He was a violent Persecutor of *Jeoffery* of *Monmouth*. His *Latin* Style is preferred to that of *Mat. Paris*, and equalled with those of *Eadmer*, and *Malsbury*, by *Dr. Wats.* *Rapin.* v. 3. *OB. Ed.* p. 530.

Provision. *Thornton*, I confess, having been a bare Epitomizer of *Braeton*, contains nothing subsequent to the Time of *Braeton*; but we more than once, in the other Compendium called *Britton*, meet with Matters relating to the Years immediately succeeding the above fourth Year of *Edward* the 1st. Wherefore, 'tis strange, had there in Fact been any such Provision, that in that Work no Notice should be taken of it. Neither indeed are there in any other of our Law Books with which I am acquainted, no not so much as in *John Fortescue*,* who expressly handles the Question concerning the Revocation of Royal Donations, any Footsteps of such a Provision. But on the contrary, as will presently appear, we meet with in our own Books abundantly sufficient Arguments to evince us, that there never was any such Provision at all. And this our Prisoner, or the Author of *Flcta*, was doubtless imposed upon, either by some shallow Persons, who usually love to prate after their returning from foreign Parts, (not unlikely from *Lyons*) in which Place a great Council had been a little before held; or was, as well as others perhaps, in this Point deceived by Letters or Writings spread abroad concerning a Provision of this kind, by Persons who had some Interest in it; the over credulous being frequently liable to such kind of Impositions; and it has been in all Ages a common Practice to amuse the World with Relations of wonderful Things transacted abroad. Several very eminent Foreigners,

'tis

* *Joan. Fortescue* In Tractatu de Dominio regali et politico.

'tis true, have, between the fourth Year of Edward the 1st, in which this Provision is said to have been made, and this our present Time, wrote a great deal concerning this Matter, or the establishing or rescinding the Alienations of supreme Princes; they have with great Care collected together the Opinions of the antients, the Laws of Emperors, and Kings, and other forensic Cases, relating to this subject; yet they, 'tis evident, had never heard of the aforesaid Provision, or of any Thing like it. 'Tis plain also from the Writings of the Doctors upon the *Extravagants*, Title *de jurejurando c. intellecto* 33, as well as from † *Bartolus* and * *Baldus*,* and almost all the other Commentators on the Title, *Quis dare feudum possit*, who may grant a Fee — that they were Strangers to it. We may to the aforesaid Antients, add the Speculator or *Durandus*, † and as to modern Authors, a great Number of them are easily to be met with, who in their respective Commentaries, treat of this subject, as — *Petrus Belluga*, * *Restaurus Castaldus*, § *Arnulphus Ruzæus*, || *Reginerus Sixtinus*, † *Henricus Bocerius*, § *Horatius Montanus*, † and others of the same Kind, in their Writings concerning the Regalia of the German Empire, and those of other Kingdoms, as well as *Franciscus Hotomanus*, * *Joannes Bodinus*. † The Code of the French and Imperial Law, † by Henry the 4th, *Petrus Tholosanus*, || *Renatus Choppinus*, § *Gregorius Lopez*, upon the Partites,

† Bartot. ad L. perhibere S. plang D. quod vi aut clam.

* Bald. in c. unico S. præterea Duc. tit. de prohib. feud. alien. † Durand. Specul. Princip. Rubric. 8. f. 2.

* Pet. Belluga. in tit. de Instrument. editione f. 11. No. 11.

§ Rest. Castald. De Imperatore quæst. 104.

|| Arual. Ruzæus Dejur. regal.

priv. 42. n. 4.

† Reg. Sixtin. De Regalibus

l. 1.

§ De Regalibus c. 4. f. 36. &c.

† Henric. Montanus de Regalibus in Præludiis. f. 28, 29, &c.

* Fran. Hotoman. illust. quæst. 1.

† Joan. Bodinus. De repub. l. 1. c. 10. † Lib. 7. tit. 2. || Pet. Tholosan. Syntag. Juris universi l. 6. c. 6. f. 16. § Renar. Choppin De Domanio Franciæ. l. 2. tit. 1.

* Greg. Lopez
in partit. lib. 2.
tit. 2. L. 8.

† Bart. de las
Casas in Question,
utrum Reges vel
Principes aliena
re &c Tubingæ
1625.

§ Alphons. Aze-
vedo. ad Constit.
Reg. l. 5. t. 10.

|| Geor. Cabedo,
part. 2. Decif.
Lufitan. 40. n. 6.

‡ Hug. Grotius
de jure Pacis et
Bell. li. 2. c. 6. f.
3. et c. 14. f. 12.

Partites, * *Bartholomæus de las Casas*, King
Alfonfus Azevedo, § *Georgius Cabedo*, per,
Hugo Grotius, ‡ who treat of the Donation
made by *Constantine*, not to mention either
the Authors quoted by these Writers, nor
great Number of others, who have handled
the same Subject. The aforesaid Author
also sometimes manage their Debates, with
regard to the Bounties and Donations
Princes, and the Alienation, and Usucapion
of the Regalia, with the greatest Exactness
and Diligence; and few of them seem to
have omitted any Thing, found either in
antient or modern Authors, relating to this
Matter. Some of the aforesaid Writers were
Italians, some *Germans*, others *Dutch*,
French and *Spanish*, and were very eminent
and learned both in History and the Law,
yet they at the same Time appear to have
been quite Strangers to the above pretended
Provision of all Christian Princes; whereas
doubtless, had any such Law ever existed,
it could not have escaped their Knowledge.
It is moreover plain from the Parliament
held in the same fourth Year of *Edward*
the 1st, the very Time this Provision is sup-
posed to have been agreed upon, that Royal
Donations or Alienations heretofore granted,
as well as such as should be hereafter made
in this Kingdom, were to be considered as
lawful and every way firm, and not at all
to be on that Account invalidated. The a-
foresaid Parliament was held after the Feast
of *St. Michael*, and that fourth Year of the
King's

King's Reign, ended on the 16th of November, next ensuing. Now it is evident from the Law, enacted by that Parliament, called the Statute *de Bigamis*,* wherein Royal Donations and Alienations are allowed of, that no such Provision was made before the holding that Parliament. And that Year was almost expired when the said Parliament ended, during which Period, as well as thro' the subsequent Ages, down to our own times, the Acts of Parliament and the Customs of the Kingdom so universally prevailed, that it can never be shewn that there was ever the least Room for acknowledging any such Provision among us. Royal Donations of large Possessions, part of the sanctified Patrimony, were formerly very frequent in this Nation, and always made at the King's Pleasure, and held good, if they were in all other Respects legal, except such were declared void by some Acts of Parliament,* which now and then laid a temporary Restraint on the Gifts of some very profuse Kings, as well as on the bold Impudency of Courtiers; or where the same Authority either revoked or disannulled such Grants, according to the (a) Exigency of Affairs,

* Stat. de Bigamis 4. Ed. 1. c. 1. & 2.

* Rot. Parl. 11. R. 2. Pet. Com. No. 23. & 24. 11. Hen. 4. Pe. Com. No. 25. & c. et vid. Stat. de Resump. 18. H. 6. in Archivis Parliamentariis.

(a) *Exigency of Affairs.* The Crown Revenue, which in the reign of Hen. the 5th. had been 56,966, was, in that of Hen. the 6th, reduced to 5000 per Annum; so much had the Crown been robbed and pillaged during the Minority of this religious, but weak and unfortunate Prince.

This occasioned that notable Act of Resumption in the 8th. of Hen. the 6th; and since that time the Parliament

Affairs, when they appeared greatly excessive. But our very Ancestors acted in a quite different Manner; for a Question arising in Parliament, in the Reign of *Edward* the 3d, relating to that celebrated Donation made by King *John* to Pope * *Innocent* the 3d and his Successors, in Consequence whereof Pope *Urban* the 5th, then required to be paid unto him, jointly by *England* and *Ireland*, an Annate of 10000 Marks, pretending also that both Realms were held by our Kings by a beneficiary Right only, and as a Fee of the See of *Rome*; All Orders even the Ecclesiastics, (which is to be wondered at) as well as the Peers or Lords and Commons assembled in that Parliament, after mature Deliberation, unanimously answered that the aforesaid Donation of King *John* was evidently null, it having been obtained without the Consent of Parliament and contrary to his Coronation Oath. *En outre ceo*, and moreover (say the Archives *les Ducs, Countes, Barons, grandes, et Commens accorderent et granterent que en ca*

• Mat. Paris. an
1214.

• Rot. Parl. 40,
Ed. 3. Num. 8.

has frequently interposed; and, particularly, after King *W* the 3d had greatly impoverished the Crown, an Act passed in the 1st *Ann*, whereby all future Grants or Leases from the Crown for any longer Term than thirty one Years or three lives are declared to be void; except with regard to Houses which may be granted for fifty Years.

The Misfortune is, as Dr. *Blackstone* observes, that the Act was made too late, after almost every valuable possession of the Crown had been granted away for ever, or else upon very long Leases; but may be of benefit to Posterity, when those Leases come to expire.

Devenant 178. — *Blackstone* V. 1. p. 286.

*que le Pape se afforceroit ou rien attemperoit
per proces ou en autre manere de fait de con-
streindre le Roy ou ses subgitts de parfaire
ce que est dit q'il voet clamer celle partie,
qu'ils resisterent et contreeesteront ove toute
leur peussance.*---The Dukes, Earls, Barons,

Great Men, and Commons, came to the following Agreement and Resolution; That in Case the Pope should at all (a) endeavour or attempt, by Process or otherwise, to compel the King or his Subjects to comply with the Conditions of his Demands, that they would resist and oppose him with all their Might. Thus the Hieratical Order united in pronouncing the aforefaid Sentence; tho' they would not, as you see, join in professing to repel likewise with all their Force, whatever Violence and Artifices the Pontifical Power should at any Time make Use of to extort a Performance of the above Donation. But if any such Provision, as our Author speaks of, concerning the Revocation of Royal Alienations, corroborated by the Sanction of all Christian Princes, had been before that Time made, can it be thought possible, that the aforefaid Parliament would have in this memorable Decision, taken no Notice of it, or could have been entirely unacquainted with it. Neither does it seem, according to our Author,

(a) *At all endeavour. Se afforceroit*—Britton makes use of these Words in the same Sense.—*Si l'tenaunt se afforce defendre l' entr. Britt. p. 266. b.*—*Si Tenens ingressum nitatur defendere. Flea 365. c. 36. f. 1.*

* Rot. Claus. 3.
Ed. 1. mem. 9.
in schedula. et
vid. Coke Inst.
part 4. fo. 13.

† Mat. Paris
Anno 1216.
et vid. Arniseum
de Donat. Con.
stantini. c. 6.

less to relate to the disannulling past, than future Alienations. And indeed that Parliament under *Edward* the 3d, was of the same Opinion with *Edward* the 1st, as is manifest from that King's Letters* written to Pope *Gregory* the 10th, concerning this Matter, the very Year before that in which this Provision is said to have been made. So likewise did *Philip Augustus* King of *France* and his Nobles shew that they had the same Sense of this Matter, and other such Alienations granted to the great Diminution of the Empire without the Consent of the States, when they gave their Answer, † to (a) *Walo* the Popes Legate, who arrogantly produced, within two Years from the making of it, that frivolous Donation of King *Jabu's*, extorted by the Wickedness of the Court of *Rome*. But thus far on these Subjects.

(a) *Walo*. An insolent rapacious Legate. King *John's* great Seal having been lost in passing the Washes of *Lincolnshire*, and no new Seal being made for King *Henry* till two Years after, the Seals of this *Walo* (or *Gualb*), and *William Marescall* the Elder, Earl of *Pembroke* the Protector, remain affixed by Parchment Labels, the former in white Wax, the latter in green, to the Original *Mag. Carta* of *Hen.* the 3d, 1217, now preserved in the *Bodleian Library* at *Oxford*. *Blash. Introd.* p. 45, 53, 54-



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